

D6j9usal

Trial

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

12 Civ. 2826 (DLC)

6 APPLE, INC., *et al.*,

7 Defendants.

8 -----x

9 June 19, 2013

10 9:30 a.m.

11 Before:

12 HON. DENISE L. COTE,

13 District Judge

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Trial

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Trial

1 (In open court; trial resumed)

2 THE COURT: Good morning, everyone.

3 Last night chambers gave the, I hope, good news to  
4 everyone. The government has an hour and 57 minutes left. And  
5 Apple has an hour and 49 minutes left. So roughly the same  
6 amount of time right down to the end here.

7 On the deposition issue, I looked at the final  
8 pretrial conference transcript from May 23. I think we had  
9 agreement with respect to depositions. I'm looking at pages 15  
10 to 16. And in any event, in the final pretrial order Apple  
11 only identified two deponents, both of whom testified live  
12 here. So it's my understanding based on the material in the  
13 final pretrial order and the final pretrial conference that  
14 Apple is not offering any deposition evidence.

15 MR. FLOYD: We are not, your Honor. Thank you.

16 THE COURT: With that, I think we're ready for  
17 Dr. Burtis to resume the stand.

18 MICHELLE BURTIS, resumed.

19 THE COURT: Dr. Burtis, I want to remind you, you are  
20 still under oath.

21 THE WITNESS: Okay. Thanks.

22 MR. BUTERMAN: Lawrence Buterman for the United  
23 States.

24 (Continued on next page)

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Trial

1 CROSS-EXAMINATION

2 BY MR. BUTERMAN:

3 Q. Good morning, Dr. Burtis.

4 A. Good morning.

5 Q. Could you turn to paragraph 42 of your declaration.

6 You see, Dr. Burtis, in paragraph 42 you talk about  
7 the Kindle direct publishing program. We discussed that  
8 yesterday

9 A. Yes.

10 Q. And you say that, "The increase in self-publisher sales can  
11 be attributed at least in part to Amazon's Kindle direct  
12 publishing program and its adoption of an agency model as  
13 employed by Apple."

14 Do you see that?

15 A. Yes.

16 Q. Now, it's your belief, is it not, that the Kindle direct  
17 program announced by Amazon -- let me back up.

18 You agree that the Kindle direct program was announced  
19 by Amazon on January 20, 2010?

20 A. I don't remember exactly but that sounds like the right  
21 date.

22 Q. Can you quickly look at DX196, please.

23 A. Yes.

24 Q. So you agree that the Kindle direct program -- direct  
25 purchasing program was announced by Amazon on January 20, 2010,

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Burtis - cross

1 correct?

2 A. Yes.

3 Q. And that was before the Apple agency agreements were signed  
4 with any of the publishers, correct?

5 A. I believe that's correct.

6 Q. And it's your belief that the Kindle direct program,  
7 publishing program, had provisions that were similar to the  
8 Apple agency agreements, correct?

9 A. Certain provisions were similar, yes.

10 Q. And one of the provisions that you believe was similar was  
11 the 70/30 split, correct?

12 A. Correct.

13 Q. Now you're referring to the fact that the Kindle direct  
14 purchasing program raised the share of revenue that went to the  
15 author and publisher from 35 percent to 70 percent, correct?

16 A. That's correct.

17 Q. But the 70/30 split in the Apple agency agreements had the  
18 effect of lowering the amount paid to publishers and authors  
19 per book, did it not, Doctor?

20 A. Only certain publishers and certain titles. That would be  
21 true -- so it actually increased the amount from 50 to 70. It  
22 decreased the amount of revenue for the defendant publishers  
23 because the DLPs actually fell under agency. And, you know,  
24 the 50 and the 70 were taken off the DLPs. But for those  
25 titles and for those publishers whose DLPs were the same or

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Burtis - cross

1 close to the same, then actually Apple's agency agreement would  
2 have increased the return to publishers.

3 Q. Doctor, is it really your testimony under oath that  
4 publishers and authors made more money per book under the Apple  
5 agency agreements than they made under the wholesale deals that  
6 existed with Amazon?

7 A. Well I don't know about authors because I've never seen any  
8 data for authors. But it is my testimony that, you know,  
9 the -- if the DLP remained the same or close to the same,  
10 compared to -- you know in the wholesale versus the agency  
11 world, then the increase in the amount a publisher would get --  
12 or that amount would increase because it was 50 percent and it  
13 went to 70 percent.

14 Q. Doctor, you studied what happened to the publisher  
15 defendants after they moved to agency, correct?

16 A. Yes.

17 Q. You would agree with me that the publisher defendants  
18 received less money -- less revenue per book after they moved  
19 to agency, correct?

20 A. Yes. They did --

21 Q. Okay.

22 A. Okay.

23 Q. So, with respect to the Kindle direct purchasing program,  
24 to the extent that it raised the amount of money that went to  
25 authors and publishers, it was different than the effect that

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Burtis - cross

1 the Apple agency agreements had on the publisher defendants'  
2 books, correct?

3 A. Just to be clear, the reason that --

4 THE COURT: No.

5 THE WITNESS: I'm sorry.

6 THE COURT: Doctor.

7 THE WITNESS: Sorry.

8 THE COURT: We're going to try today to listen to the  
9 question and answer the question that's asked.

10 THE WITNESS: Okay. Can you -- it's just not true of  
11 all books. That was my only.

12 Q. Let me ask the question again, Doctor.

13 With respect to the Kindle direct purchasing program,  
14 to the extent that it raised the amount of money that went to  
15 authors and publishers, it was different than the effect that  
16 the Apple agency agreements had on the publisher defendants'  
17 book sales, correct?

18 A. And I would say correct to certain books.

19 Q. Thank you, Doctor.

20 MR. BUTERMAN: No further questions, your Honor.

21 REDIRECT EXAMINATION

22 BY MR. SWANSON:

23 Q. Good morning, Dr. Burtis.

24 A. Good morning.

25 MR. SWANSON: Your Honor, if I may, I would like to

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Burtis - redirect

1 attend to a few housekeeping issues before starting the  
2 examination.

3 Tab 3 of Exhibit 721 which is Dr. Burtis' declaration  
4 includes 17 charts or tables which have now been admitted. But  
5 we also gave them additional exhibit numbers under the theory  
6 that that might help us in dealing with those documents. Two  
7 of them have raised issues that have -- have led us and I think  
8 your Honor has already heard about this a few days ago -- to  
9 agree with Amazon to have redacted public versions and then  
10 sealed original versions.

11 So what I would like to do, your Honor, is to hand up  
12 the sealed version of the two exhibits that fall under that  
13 rubric that are in tab 3 of Exhibit 721, if I may. Those are  
14 documents which under tab 3 have the DX numbers 436 and 441.

15 THE COURT: I think -- thank you. I really appreciate  
16 this. I think we've already sealed and filed with the clerk of  
17 court the unredacted copies. We took them from the attachments  
18 to the Amazon letter on this issue. Then I think we're ready  
19 to go.

20 MR. SWANSON: Do we need -- Your Honor, do I need to  
21 give you a list of the other fifteen exhibit numbers that are  
22 associated with the charts and graphs in tab 3 so that we can  
23 have those I guess admitted under those numbers as well.

24 THE COURT: If you'd like to have them admitted and  
25 they are not already, yes.



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Burtis - redirect

1 MR. SWANSON: Not under these numbers at least. Let  
2 me read them out. And they're just the documents that are  
3 under tab 3 of Exhibit 721. So here they are. DX434, which is  
4 already admitted. DX435 which is already admitted. DX436  
5 which is one of the documents that is under seal. DX437.  
6 DX438. DX439. DX440. DX441 is another sealed document. The  
7 public version is in the binder. DX443. DX445. DX448.  
8 DX449. DX452. DX453. DX461. DX463. And DX465.

9 So we would offer those, your Honor, as counterparts  
10 to the exhibits that are already in 721.

11 MR. BUTERMAN: No objection, your Honor.

12 THE COURT: They are received.

13 (Defendant's Exhibits DX434, DX435, DX436, DX437,  
14 DX438, DX439, DX440, DX441, DX443, DX445, DX448, DX449, DX452,  
15 DX453, DX461, DX463 and DX465 received in evidence)

16 Q. Dr. Burtis, in response to Mr. Buterman's last question you  
17 had indicated that your answer was correct in part. Could you  
18 explain the part that it is correct and the part that it isn't.  
19 A. Sure.

20 What I was trying to get at is that even among the  
21 defendant publishers' books, certainly the hardcover new  
22 release books, the DLP fell. And so even though they were  
23 making 70 percent instead of 50 percent, the result of that was  
24 that they made less.

25 And -- but there were other books that they had, in

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Burtis - redirect

1 particular backlist, where that was not necessarily true and  
2 the DLPs did not fall. And so even for that set of books, they  
3 would have made more under the 70 model than the wholesale  
4 model.

5 For them, as, overall for their set of books, it is  
6 true, and I have an exhibit that shows this, that overall they  
7 did make less under agency.

8 Q. When you say they did make less, you're referring to major  
9 publishers?

10 A. The defendant publishers and I guess I should say what I  
11 really mean is per book or, you know, per unit. I don't mean  
12 overall.

13 Q. And on average do nonmajor publishers make more or less on  
14 average per title under the 70/30 agency share split?

15 MR. BUTERMAN: Objection.

16 THE COURT: Sustained.

17 Q. Let me ask you to turn to paragraph 13 of your report.

18 The first sentence of paragraph 13 reads, "My goal in  
19 analyzing the data was to present the Court with a clear and  
20 complete picture of the competitive conditions in the alleged  
21 relevant market before and after the implementation of the  
22 agency agreements."

23 What did you do to achieve that goal, Dr. Burtis?

24 A. So, what I did -- well I tried to -- what I did is I  
25 created or, you know, assembled a very large database of eBook

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1 information. And I also reviewed a lot of material to try to  
2 put that data into some perspective. I calculated various  
3 statistics with that data to try to form a picture of what was  
4 going on in the marketplace and to, you know, to see both  
5 before and after Apple's entry what was happening in the  
6 marketplace.

7 Q. When you testified that you reviewed certain materials,  
8 what kind of materials?

9 A. I looked at a number of Amazon documents so that I could  
10 understand their pricing strategy. I looked at Barnes & Noble  
11 documents. I reviewed -- I tried to review everything I could  
12 to understand how prices were being set.

13 Q. Did you have a team of people who assisted you in this  
14 task?

15 A. Yes, I did.

16 Q. And how much time did you and your team devote to this  
17 review?

18 A. Are you asking specifically about the documents or are you  
19 asking about everything?

20 Q. Well, why don't we start with everything.

21 A. With everything. Well, we, I think, started working on  
22 this case in August. And I would say worked extremely hard up  
23 through December when I believe it was the end of December when  
24 the first report was issued.

25 A lot of that work was related to the, you know,

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1 assembling this database because it was basically we were  
2 taking bits and pieces of information from a lot of different  
3 databases and trying to, you know, make it all consistent. And  
4 it was actually very time consuming.

5 Q. And how much time did you devote to studying documents and  
6 materials?

7 A. So, that was something that probably I did more of than  
8 anybody else on my team. And I did it continually throughout  
9 this process as I, you know, learned more about the data and  
10 more questions came up about, you know -- it was a very  
11 iterative process, actually.

12 As we learned things about the marketplace, I would go  
13 back to the documents and try to understand it and put it into  
14 context. So, I'm not sure that answers the question, but.

15 Q. Did you say you studied documents from Amazon?

16 A. Yes.

17 Q. Did you study documents from Barnes & Noble?

18 A. Yes, I did.

19 Q. Sony?

20 A. I don't actually recall that we had documents from Sony.  
21 We had the data. And I did -- we had public information about  
22 Sony. But I don't remember specifically whether there were  
23 documents.

24 THE COURT: Doctor, I'm just going to ask you to move  
25 your chair up and take that mic and just move it under your

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1 chin and keep that voice up.

2 THE WITNESS: Is that better?

3 THE COURT: That's better. Thanks so much.

4 Q. Now have you conducted your analysis within a relevant  
5 market in this case?

6 A. Yes. I have adopted the relevant market that the  
7 plaintiffs have claimed in this case.

8 Q. Did you make any assumptions about the interchangeability  
9 of products within that market?

10 A. Only insofar as I have adopted it as a relevant market.

11 The idea of relevant market is that products within a  
12 relevant market are reasonably interchangeable; that is, they  
13 are reasonable substitutes for one another.

14 Q. And was that an assumption you made?

15 A. Yes, it was.

16 Q. Now, did you look at the state of price competition in the  
17 relevant market in late 2009?

18 A. Yes, I did.

19 Q. What did you determine about how many price setters there  
20 were in the eBooks market, trade eBooks market at that point in  
21 time?

22 A. So there were three retailers who were in the market.

23 There was Amazon, Sony, and Barnes & Noble.

24 There were likely some very small other players but  
25 those were the three that were evident in the marketplace.

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1 Q. And how much price competition was there in the relevant  
2 market before Apple landed in New York in December of 2009?

3 MR. BUTERMAN: Objection.

4 THE COURT: Sustained.

5 Q. Well what did you observe in your study about the nature of  
6 price competition in the relevant market in late 2009 period?

7 MR. BUTERMAN: Objection.

8 THE COURT: Sustained.

9 Q. Dr. Burtis, did you look at the state of price competition  
10 in the relevant market in 2010 and afterwards?

11 MR. BUTERMAN: Objection.

12 THE COURT: Sustained.

13 MR. SWANSON: Might I have an understanding as to --

14 THE COURT: I don't think this is -- I don't think  
15 that the government opened the door to this line of questioning  
16 based on their cross-examination of the doctor.

17 MR. SWANSON: Just to register an objection obviously  
18 respectfully. The great bulk of the examination was about the  
19 nature of Dr. Burtis' work, what she controlled for, and the  
20 like. It seems to us that that opens the door wide open to  
21 have her explain what it is she did and what she observed.

22 THE COURT: Thank you.

23 Q. Now, Dr. Burtis, you have in your report, you've marked it  
24 with an additional number, that's an exhibit that we've seen a  
25 lot of, DX434, then there's DX435 as well. These are the

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1 graphs. 434 is to the left. 435 is to the right. You can see  
2 those, I take it.

3 A. Yes.

4 Q. And you're familiar with those?

5 A. Yes.

6 Q. Now, I would like to hand up another document.

7 MR. SWANSON: Your Honor, I have a confession to make,  
8 somewhat embarrassing. This is what we've marked as Exhibit  
9 719 and it was previously incarnated as Exhibit 703 which was  
10 used during the deposition, or I'm sorry, the testimony of  
11 Dr. Ashenfelter. We marked it for identification as 703. And  
12 then somehow another exhibit, I think Mr. Moerer's declaration,  
13 was admitted as 703. So this is perhaps a good time to let the  
14 record reflect that the 703 that was used with Dr. Ashenfelter  
15 is now DX719.

16 Q. So, Dr. Burtis, do you recognize Exhibit 719?

17 A. I do.

18 Q. And can you tell us what it is?

19 A. This is the -- these are the numbers that are essentially  
20 behind or I don't remember which of the exhibits. I think it's  
21 434. These are the numbers behind that exhibit. It shows the  
22 average prices in the relevant market by month as well as for  
23 each of the defendant publishers.

24 Q. Are these numbers the counterparts for lines that are in  
25 those exhibits?

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1 A. Yes, that's correct.

2 MR. SWANSON: Your Honor, I offer 719.

3 MR. BUTERMAN: No objection, your Honor.

4 THE COURT: Received.

5 (Defendant's Exhibit 719 received in evidence)

6 Q. Now, turning back to the graphs, 434 and 435. Do these  
7 reflect the entirety of the work you've done when it comes to  
8 evaluating competition in the relevant market?

9 A. No.

10 Q. And you've talked about a process and what types of  
11 materials you've looked at. What type of factors did you  
12 examine beyond looking at these numbers?

13 A. So, I tried to understand what was behind the trends in  
14 prices that we see. So, I looked at, for example, changes in  
15 output, who was selling that output; shares of different types,  
16 publishers in the market. I tried to understand the growth in  
17 products. And I did try to understand what was going on with  
18 the defendant publishers' prices as well.

19 Q. Thank you, Doctor. When Apple did enter into the  
20 agreements with the five major publishers if you recall?

21 A. I'm sorry. I didn't hear the first part of your question.  
22 When?

23 Q. When. In general terms?

24 A. It was the beginning of April 2010.

25 Q. And you recall when Mr. Buterman was asking you questions



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1 about whether you controlled for factors in the relevant market  
2 in undertaking your analysis?

3 A. Yes.

4 Q. You indicated in substance in response to those questions  
5 in order to inform that you undertook you believe some control.  
6 Is that --

7 A. Yes.

8 Q. Can you explain what type of control that you took account  
9 of or implemented in your work?

10 A. Yes. So, what I try to do is understand the factors that  
11 were leading to or contributing to the changes in price that I  
12 saw in the data, those changes in price in the relevant market.  
13 And so one of the things that I did was try to find the source  
14 of that.

15 We can see from Exhibit 435 -- I can't tell if that's  
16 a 5 or an 8 -- 5. That the prices of the defendant publishers  
17 are increasing. The price of Random House increases when it  
18 moves to agency. But yet the average price in the relevant  
19 market is falling.

20 And so I undertook to -- I undertook various analyses  
21 to try to find out what was causing that.

22 So, I began by -- there's I believe another exhibit in  
23 this pile somewhere that shows the average price of  
24 publishers -- I think I called them independent publishers.  
25 It's essentially the set of publishers besides the defendant

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1 publishers and Random House. And I found that, in fact, those  
2 prices were falling during the time period that the average  
3 price in the relevant market was falling.

4 So then once I did that, I tried to understand whether  
5 or not that was independent or unrelated to Apple's entry or  
6 whether or not Apple's entry and the terms of the agency  
7 agreements could have contributed to those falling prices.

8 Q. Let me ask you first. Did you observe any change in the  
9 relevant market in average price in January of 2010?

10 A. Yes. In January of 2010 there was a very sharp decline --  
11 I mean relative to what you had seen before. And that actually  
12 continued into February of 2010.

13 In February of 2010, you can kind of see it here in  
14 this graph, is the lowest price, the lowest average price in  
15 the market over the period for which I had data.

16 Q. Now in 2009 did you observe any -- the timing trend in  
17 average prices in the relevant market?

18 A. No. Is there a very slight -- and it's very difficult to  
19 see in this graph. You'd have to actually look at the  
20 underlying data. But there is a very slight upward trend in  
21 prices from 2008 to 2009.

22 Q. Doctor, can you turn to paragraph 8 of your declaration.  
23 I'd like to focus you on the first sentence of that paragraph  
24 which reads, "The growth in eBook sales (and overall lower  
25 eBook prices) are attributable in large part to the dynamic

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1 nature of competition in the market, stimulated by the  
2 expansion of platforms, sales models, and publishers vying for  
3 consumer's attention."

4 Do you see that?

5 A. Yes.

6 Q. What time period are you speaking of here?

7 A. I am speaking of the period after April of 2010.

8 Q. And which platforms are you referring to in this sentence?

9 A. I am referring to the Apple platform and Barnes & Noble  
10 primarily.

11 Q. Which sales models?

12 A. The wholesale model and the agency model.

13 Q. And which publishers are you referring to in this sentence?

14 A. I am referring to the publishers who began selling books on  
15 the agency agreement and they're the ones that obtained the  
16 ability to set their own prices on that model.

17 Q. How many price setters were there in the relevant market  
18 after Apple entered?

19 A. I don't know the exact number. There were thousands.  
20 Because each of those publishers who signed an agency agreement  
21 with Apple had the ability to set their own retail price.

22 Q. Now, you talked about the five defendant publishers. Did  
23 that group of thousands of price setters include large  
24 publishers?

25 A. It did. I mean it included, you know, some that were --

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1 the six publishers that we talk about generally are very large.  
2 But there are others that are, you know, not as large but still  
3 larger than many others.

4 Q. And did it include self-publishers?

5 A. It did, yes.

6 Q. Can you give an example of a large albeit nondefendant  
7 publisher.

8 A. Let's see. There is Perseus, there is -- is it Workman.  
9 There is Scholastic. There's Disney. Those are the ones that  
10 I can think of.

11 Q. And is it your testimony they became price setters in the  
12 relevant market?

13 A. Yes.

14 Q. Looking again at paragraph 8 of your declaration. What do  
15 you mean by the term "dynamic nature of competition"?

16 A. Well I just mean that the -- there were -- there were many  
17 changes that were occurring in this market. And in  
18 particular -- well, I guess I'm really referring to the last  
19 part of that sentence, you know, the new platforms that were  
20 available, the sales models that existed as well as the entry  
21 of the publishers as price setters.

22 Q. You had mentioned that Barnes & Noble was one of the  
23 platforms that you intended to refer to in paragraph 8. What  
24 was it about Barnes & Noble that stimulated competition?

25 A. (No response).

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1 Q. As you refer to it in this sentence?

2 A. Well, Barnes & Noble, after they went to the agency model,  
3 was able to earn margins that provided the opportunity for it  
4 to invest in its business that it did not have prior to that  
5 time. It didn't look like -- well, in the data that I looked  
6 at, which I believe was November and December of 2009, that was  
7 the time period when Barnes & Noble started meeting Amazon's  
8 prices and they started losing money.

9 Q. And I take it you were here yesterday to hear the testimony  
10 of Ms. Horner?

11 A. I was, yes.

12 Q. Was that consistent or inconsistent with the understanding  
13 you developed about Barnes & Noble's role in the relevant  
14 market?

15 A. That was very consistent with what I understood from the  
16 data and their documents.

17 Q. Let me ask you to turn to Exhibit DX473.

18 A. Yes.

19 Q. Do you recognize that?

20 A. Yes.

21 Q. Is that an exhibit you prepared?

22 A. Yes.

23 MR. SWANSON: Your Honor, we'd offer DX473.

24 MR. BUTERMAN: No objection.

25 THE COURT: Received.

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1 (Defendant's Exhibit 473 received in evidence)

2 Q. What does that depict, Dr. Burtis?

3 A. This was the one that I was actually referring to earlier.

4 This exhibit shows the overall average price in the relevant

5 market; that's the green line. The average of the defendant

6 publishers' prices; that's the red line. The blue line is

7 Random House's average price. And then that black line is the

8 average price of the publishers besides the defendant

9 publishers and Random House.

10 Q. Would it be fair to refer to that line as the independent  
11 publisher line?

12 A. I think, yeah, that is how I describe it.

13 Q. Does that include self-publishers as well?

14 A. It does, yes.

15 Q. Focusing on the red line for a moment, which -- I take it  
16 that's same line that's in DX434 and 435; is that right?

17 A. 434 is -- I don't believe there's the average across the  
18 defendant publishers. There is each one of them. But DX435 I  
19 believe there is an average defendant publisher line.

20 Q. Thank you for the correction.

21 Now, did you ever calculate the extent to which the  
22 defendant publishers' prices went up on an average in the six  
23 months after April 1, 2010 compared to the six months before?

24 A. Yes. It's about 17 percent.

25 Q. Did all of the publisher defendants' titles increase in

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1 price?

2 A. No, they didn't. Even among hardcover new release titles  
3 there were many that either did not change or fell shortly  
4 after the entry of Apple and the move to agency.

5 Q. Could you give an example of new release that fell in price  
6 after April 1.

7 A. Yes. So one of the things I did is I looked at the  
8 hardcover new releases two weeks before and two weeks after.  
9 And one of the titles that fell in price was True Compass  
10 written by Senator Kennedy. And I noticed this because the  
11 government used it in the opening.

12 And it is true as they showed in Court the end of  
13 January the price of that title was 9.99. But in 2009 Amazon  
14 had adopted a strategy where hardcover new release books after  
15 90 days would -- it would no longer be 9.99 and they would  
16 increase based on their digital list price.

17 So, in March of 2010 the price of that title at Amazon  
18 increased to \$19.25. So in that particular case, the change  
19 from wholesale to agency led to a decline in the price of that  
20 title.

21 Q. Do you recall what the price was under agency?

22 A. It's 16.99.

23 Q. And do you recall the list price of that book?

24 A. \$35.

25 Q. And how did 16.99 relate to the price caps for a \$35 list

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1 price book?

2 A. I believe that was consistent with those caps.

3 Q. Dr. Burtis, was pricing at \$9.99 common or uncommon after  
4 Apple's entry in the relevant market?

5 A. It remained -- I'll just say, it was about --  
6 three-quarters of the books that were sold were either 9.99 or  
7 lower.

8 Q. And this is after Apple's entry?

9 A. Yes.

10 Q. Looking back at DX473 you said the blue line depicts Random  
11 House?

12 A. Yes.

13 Q. Or Random House's average prices; is that correct?

14 A. Yes.

15 Q. What did you observe from this data about Random House's  
16 prices?

17 A. Well, a couple of things. One is you can see after the  
18 defendant publishers moved to agency, you can see the decline  
19 in Random House's average price, which is consistent with the  
20 testimony about the way that Amazon was promoting and  
21 discounting those titles.

22 And you can also see that when Random House itself  
23 moved to agency that its price increased. And it increased a  
24 little bit more than the average of the defendant publishers.

25 Q. And what, if anything, is the significance of that fact to



D6j9usal

Burtis - redirect

1 your analysis?

2 A. So the significance of that is that Random House had to  
3 figure out what prices to set for its books. And it did  
4 that -- it had to do that within the context of the supply and  
5 demand factors present in the marketplace. And so its prices  
6 represent market prices; that is, those are the prices that it  
7 could set given the market conditions at the time.

8 Q. Doctor, what happened to output after Apple entered the  
9 relevant market?

10 A. Output continued to increase.

11 Q. Let me ask you to turn to DX463 which, your Honor, is in  
12 evidence.

13 Tell us what -- first of all, did you prepare that?

14 A. Yes.

15 Q. Tell us what it is.

16 A. These are -- this is the number of paid eBook titles in the  
17 Kindle store. And this is taken from Amazon's press releases  
18 over time.

19 Q. What do you conclude from DX463?

20 A. That there was a continuing large number of new titles  
21 available in the marketplace. And, of course, that Amazon  
22 continued to market this. This was an important way that they  
23 competed. And you can see that that trend, if you will,  
24 certainly -- there was almost an influxion point around the  
25 time that Apple entered.

D6j9usa1

Burtis - redirect

1 Q. What do you mean by influxion point?

2 A. I just mean that the trend shifts a little bit to be a  
3 little bit steeper.

4 Q. Now let me ask you to turn to Exhibit DX441 which is in  
5 evidence.

6 MR. SWANSON: There is a sealed version of this, your  
7 Honor. This is one of the exhibits we were speaking of a few  
8 moments ago.

9 Q. So we have the redacted version -- I'm not sure we have the  
10 redacted version here -- yes?

11 A. No. Oh, yes, it is. Sorry.

12 Q. Dr. Burtis, is this an exhibit that you prepared?

13 A. Yes.

14 Q. Can you tell us what it depicts.

15 A. This is showing the increase in the number of publishers  
16 selling eBooks at Amazon and their increased share over time.

17 Q. What did you conclude from this exhibit?

18 A. Well this actually helped me understand why I saw prices  
19 falling or I tried to understand what was going on with the  
20 average price in the relevant market.

21 And it also indicated to me that the entry of these  
22 publishers was certainly consistent with a very well  
23 functioning marketplace that, you know, there was nothing wrong  
24 with the competitive process, if you will. The number of  
25 publishers continued to increase.

D6j9usa1

Burtis - redirect

1 MR. BUTERMAN: Objection. Move to strike the last  
2 portion of that answer.

3 THE COURT: Stricken.

4 Q. Doctor, let me ask you to turn to Exhibit 462.

5 MR. SWANSON: This, your Honor, is also a redacted  
6 exhibit, the original of which is under seal. It is not in  
7 evidence.

8 Q. Let me ask, Dr. Burtis, is this an exhibit you prepared?

9 THE WITNESS: Yes.

10 MR. SWANSON: Your Honor, we'd offer 462.

11 THE COURT: I think it is received already.

12 MR. SWANSON: Thank you.

13 Q. Dr. Burtis, what does this exhibit depict?

14 A. This shows the quantity sold of self-published books at  
15 Amazon over time.

16 And I should mention the only way I could identify  
17 self-published books in this data was to assume that a  
18 self-published book was one where the author and the publisher  
19 was the same in the data. So that was the only way I could do  
20 that.

21 Q. What did you conclude from this exhibit?

22 A. I concluded that there was a very substantial increase  
23 after Amazon increased the royalty that was available on  
24 self-published books from 35 to 70 percent.

25 Q. Speaking of self-publishing programs, Mr. Buterman asked

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Burtis - redirect

1 you yesterday whether you were saying that Amazon was mirroring  
2 Apple in regard to the 70/30 KDP split. Do you recall that  
3 question?

4 A. Yes.

5 Q. Does it matter to your economic opinion whether Amazon was  
6 mirroring Apple's proposed agency terms or if Apple was  
7 mirroring Amazon in giving self-publishers a 70/30 split?

8 A. Not really. I don't think it matters. I think it is --  
9 certainly one or the other one, as they learned about their  
10 competitor's program had the incentive to offer similar terms.  
11 And once one -- you know, once they offer those similar terms,  
12 it's very difficult for either one of them to change their mind  
13 and give publishers less. So it is very -- it's  
14 self-reinforcing, if you will.

15 Q. Doctor, I'd like you to assume for the moment that Amazon  
16 retained control over self-publishers' prices under the KDP  
17 program. Do you have that assumption in mind?

18 A. Yes.

19 Q. Does that change any of your opinions about the effect or  
20 impact of that program?

21 MR. BUTERMAN: Objection.

22 THE COURT: Sustained.

23 Q. Doctor, let me ask you to turn to paragraph 33 of your  
24 declaration.

25 In your first sentence of that paragraph you state

D6j9usal

Burtis - redirect

1 that, "Plaintiffs' theory of reduced eBook output or diminished  
2 eBook output growth, in the alleged relevant market is  
3 implausible and based on unsubstantiated assertions or flawed  
4 and complete empirical analysis."

5 Please explain what you mean by this.

6 MR. BUTERMAN: Objection.

7 THE COURT: Sustained.

8 MR. SWANSON: There were numerous questions about  
9 output, whether Dr. Burtis was examining output.

10 MR. BUTERMAN: Your Honor, this paragraph goes to a  
11 critique of Professor Gilbert. And there were no questions  
12 about Dr. Burtis' critique of Professor Gilbert during my  
13 examination.

14 THE COURT: Sustained.

15 MR. SWANSON: Let me ask to have placed up if you can,  
16 Andrew, trial transcript from yesterday, page 2253, starting at  
17 line 8 through 15.

18 Let me just read those questions so I can ask you  
19 about them, Dr. Burtis.

20 Mr. Buterman asked.

21 "Q. You agree that there are other factors that contributed to  
22 the increase in eBook output you observed in the postagency  
23 period, correct, Doctor?

24 "A. Yes. There are factors that contributed to growth.

25 "Q. And you cannot quantify how much, if any, of the increase

D6j9usal

Burtis - redirect

1 in eBook output you observed is a result of the agency  
2 agreements, can you?

3 "A. That's correct, I cannot."

4 Do you see that?

5 A. Yes.

6 Q. And you recall that exchange.

7 Can you explain what you meant by your answer to the  
8 second question?

9 A. Well, what I was -- what I was thinking was that -- so  
10 there is an increase in output that we observed in the data.  
11 But, there is no evidence that the increase in output was any  
12 different after agency than it was prior to agency.

13 Q. Doctor, can you quantify any reduction in eBook output as a  
14 result of the agency agreement?

15 A. No. As I said, the only evidence -- well the evidence that  
16 I understand exists about this question is that there is no  
17 statistical change in the trend of output in the agency period  
18 compared to the prior period.

19 Q. Let me ask you to look at DX461 which is in evidence.

20 Is this an exhibit that you prepared?

21 A. Yes.

22 Q. What does it depict?

23 A. These are Apple's paid sales -- actually it's quantity of  
24 eBooks sold by Apple over this period. And those are just paid  
25 sales.

D6j9usa1

Burtis - redirect

1 Q. What conclusions can you draw from this exhibit?

2 A. This shows that, you know, Apple enters the market and is  
3 quite successful in selling eBooks.

4 Q. And do you have an understanding as to the model under  
5 which all of these eBooks were sold?

6 A. All of them were sold under the agency model.

7 Q. Is it your opinion, Doctor, that the price in output trends  
8 you've identified in 2010 and later years were unrelated to  
9 Apple's entry in the agency model?

10 MR. BUTERMAN: Objection.

11 THE COURT: Sustained.

12 Q. Dr. Burtis, do you have an opinion about whether average  
13 market prices would have been different but for the entry of  
14 Apple and the adoption of the agency model?

15 A. Yes. I have an opinion.

16 Q. What is your opinion?

17 A. So my opinion is that the economic data and information  
18 that I reviewed indicate that there was entry by publishers and  
19 additional competition from those publishers who were setting  
20 prices in the marketplace and that Apple entered as a new  
21 competitor. And all of those factors intensified competition  
22 and led prices to be lower than they otherwise would have been.

23 MR. BUTERMAN: Move to strike.

24 THE COURT: Stricken.

25 MR. SWANSON: Your Honor, is this a scope objection?

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Burtis - redirect

1 THE COURT: Yes. Among other things. The scope of  
2 her original testimony -- counsel, this expert was invaluable  
3 in this case and the work she did. But, she did not present a  
4 causation analysis except with respect to the defendant  
5 publishers potentially. And that's fine.

6 I don't want to discount the importance of this very  
7 important work to my understanding. But we're not going to try  
8 to convert now through redirect examination an expert who was  
9 tendered for one purpose into a completely different causation  
10 expert.

11 MR. SWANSON: We understand your ruling, your Honor.  
12 I just wanted to clarify the record. We do object to, your  
13 Honor, I hope is not offended by it.

14 THE COURT: Never offended by an objection. That's  
15 the role of counsel. And my role to rule.

16 MR. SWANSON: I've always wanted to say I'm not a  
17 potted plant. But no, no, maybe I am.

18 Q. Doctor Burtis, you referred yesterday in response to a  
19 question by Mr. Buterman about regressions by other experts in  
20 the case to a regression by Professor Ashenfelter that you said  
21 he described as a baby step.

22 Do you recall that response?

23 A. Yes.

24 Q. What regression were you referring to?

25 A. Professor Ashenfelter attempted to control for the entry of



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Burtis - redirect

1 new publishers and take account of that as it would affect the  
2 average prices in the market.

3 Q. In your opinion have Professor Ashenfelter's regression  
4 analyses shown that market prices would have fallen more but  
5 for the entry of Apple and the adoption of the agency model?

6 A. No, it doesn't.

7 Q. Now let me ask you to turn to DX446. This is not in  
8 evidence.

9 Is this an exhibit you prepared?

10 A. It is.

11 MR. SWANSON: Your Honor we would offer 446.

12 MR. BUTERMAN: No objection.

13 THE COURT: Received.

14 (Defendant's Exhibit 446 received in evidence)

15 Q. Just in the interest of time let me just move through a  
16 number of these. Can you turn to DX450. That should be in  
17 your --

18 A. Yes.

19 Q. And is that an exhibit you prepared?

20 A. Yes.

21 MR. SWANSON: We'd offer 450, your Honor.

22 MR. BUTERMAN: No objection.

23 THE COURT: Received.

24 (Defendant's Exhibit 450 received in evidence)

25 Q. Can you turn, Dr. Burtis, to DX451.

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Burtis - redirect

1 A. Yes.

2 Q. Is this an exhibit you prepared?

3 A. Yes.

4 MR. SWANSON: We would offer 451.

5 MR. BUTERMAN: Your Honor, I'm sorry. I apologize.

6 DX450 and 451 are, as far as I understand, exhibits that were  
7 initially attached to Dr. Burtis' first report regarding an  
8 opinion relating to innovation which Dr. Burtis removed from  
9 her rebuttal report and is not testifying about at trial. And  
10 there's nothing in her direct testimony that relates in any way  
11 to DX450 or 451, I believe.

12 THE COURT: So you're now objecting to both?

13 MR. BUTERMAN: I am.

14 THE COURT: Or just 451?

15 MR. BUTERMAN: 450 hand 451. And I apologize, your  
16 Honor.

17 MR. SWANSON: Your Honor, may I lay a foundation?

18 THE COURT: Certainly. By pointing me to the portion  
19 of her direct testimony that this relates to.

20 MR. SWANSON: Yes. These exhibits are referenced in  
21 Dr. Burtis' direct testimony as exhibits that she prepared.

22 Q. Let me ask Dr. Burtis, if I may, without getting into the  
23 substance of DX451, can you -- does this relate to your direct  
24 testimony in this case?

25 A. It does. All this is, is showing the, by retailer and by

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Burtis - redirect

1 defendant publisher, their sales in the various categories of  
2 books.

3 THE COURT: I'm looking at the direct testimony. Can  
4 you point me to, Mr. Swanson, the paragraph. I see paragraph  
5 28 we skip to 452 and 453.

6 MR. SWANSON: Well your Honor the reference to the --  
7 all of the exhibits that were attached to the -- Dr. Burtis'  
8 reports, this one was attached to her initial report as an  
9 exhibit for, are cited in the declaration, referenced as  
10 exhibits that she prepared. In terms of specific discussion,  
11 it's not specifically discussed in her report, but it  
12 illustrates the data that is discussed in her report and her  
13 quantification. I didn't think it was terribly controversial.

14 THE COURT: So happy to look at a particular sentence  
15 in the report.

16 BY MR. SWANSON:

17 Q. Dr. Burtis is there a particular sentence in the report  
18 that you would refer to as connecting to this exhibit?

19 THE COURT: To 450 and 451, DX450 and DX451.

20 MR. SWANSON: I think we're just focused on 451 right  
21 now.

22 THE COURT: Okay.

23 MR. SWANSON: At least I --

24 THE COURT: The objection is to both.

25 MR. SWANSON: Yes. I just wanted to take them one at

D6j9usal

Burtis - redirect

1 a time.

2 THE COURT: Good. DX451.

3 THE WITNESS: It kind of relates --

4 THE COURT: Which paragraph?

5 THE WITNESS: Fifteen. If you look at -- this is --

6 THE COURT: Excuse me. Just let me look.

7 THE WITNESS: Sorry.

8 THE COURT: I don't see this as support for --  
9 paragraph 15 leads up to paragraph 16, not surprisingly. And  
10 so I don't find this would have put the plaintiff on notice  
11 that all of a sudden in the direct testimony we're talking  
12 about Exhibit DX451.

13 (Continued on next page)

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D6JPUSA2

Burtis - redirect

1 MR. SWANSON: Your Honor, Page 19.

2 THE COURT: Page 19, I don't have. The signature is  
3 on Page 18.

4 MR. SWANSON: No, I'm sorry. Well, let me move on to  
5 another, your Honor.

6 THE COURT: Okay. So DX450 is stricken, and DX451 is  
7 not received.

8 BY MR. SWANSON:

9 Q. Let me ask you to turn to DX469 --

10 A. Yes.

11 Q. -- Dr. Burtis. Okay. Now, was this an exhibit in your  
12 rebuttal report?

13 A. I believe that's correct.

14 Q. And what -- If you could help me out. Your paragraph on  
15 Barnes and Noble?

16 A. Let's see, we were just looking at it. 54? I'm sorry, 53  
17 and 54.

18 Q. 53 and 54. Does DX469 relate to your testimony in  
19 paragraph 53 and 54?

20 MR. BUTERMAN: Objection.

21 THE COURT: Let me look. So paragraph 53 relates to  
22 DX465. So turning to paragraph 54, it talks about Barnes and  
23 Noble's negative gross margins in December of '09 and January  
24 of 2010. So why isn't, Mr. Buterman, DX469 related to that?

25 MR. BUTERMAN: Your Honor, I'm not suggesting that

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Burtis - redirect

1 it's not. I'm suggesting that I didn't ask any questions about  
2 this topic during my examination, and that's the basis for my  
3 objection.

4 THE COURT: Sustained.

5 MR. SWANSON: I believe, your Honor, we've had  
6 testimony today about Barnes and Noble that came up in reaction  
7 to a question that wasn't within the scope, and that's the  
8 basis on which we offered it.

9 THE COURT: Today, I think the only examination by the  
10 government was on self publishing, KDP from program at Amazon  
11 and related topics. So I think the objection is sustained.

12 MR. SWANSON: I have no further questions. Thank you.

13 RECROSS EXAMINATION

14 BY MR. BUTERMAN:

15 Q. Dr. Burtis, could you just look at the DX719? That's the  
16 big chart here.

17 A. Yes.

18 Q. And, Doctor, counsel asked you about what was happening in  
19 January 2010 and you testified about a downward spike, correct?

20 A. Correct.

21 Q. Doctor, do you see that prices actually started to decline  
22 in December of 2009?

23 A. Yes, they did a little.

24 Q. And, Doctor, do you know what happened in December of 2009?  
25 Or let me -- actually, let me just say it. Isn't that when

D6JPUSA2

Burtis - recross

1 Barnes and Noble entered the market with its NOOK device?

2 A. Yes.

3 MR. BUTERMAN: Thank you.

4 REDIRECT EXAMINATION

5 BY MR. SWANSON:

6 Q. Dr. Burtis, did anything else happen in December of 2009 in  
7 the relevant market?

8 A. There was the press associated with Apple's entry.

9 MR. SWANSON: And, your Honor, I would offer DX469 on  
10 Barnes and Noble's gross margins in November, December of 2009.

11 THE COURT: Is there an objection or not?

12 MR. BUTERMAN: No objection -- I'm sorry, which  
13 document?

14 THE COURT: 469, it's the -- it's 469.

15 MR. BUTERMAN: I apologize, your Honor. We have the  
16 same objection.

17 THE COURT: Yes, sustained.

18 Doctor, again, I want to thank you and your team for  
19 their invaluable work in amassing an enormous quantity of data  
20 and displaying it in a way that makes it intelligible and  
21 helpful certainly to me but also, obviously, to the parties.

22 So you have a category called independent publishers;  
23 am I right?

24 THE WITNESS: Yes.

25 THE COURT: And, again, is that everyone except the

D6JPUSA2

Burtis - redirect

1 publisher defendants?

2 THE WITNESS: I believe so. If you could -- Are you  
3 looking at something in particular?

4 THE COURT: No. I just want to ask you a question.

5 THE WITNESS: I usually use that term to be everybody  
6 except the defendant publishers and Random House.

7 THE COURT: Thank you. And that group then includes  
8 the self publishers, authors who do not use a publishing  
9 company to go to market; is that right?

10 THE WITNESS: That's true.

11 THE COURT: Okay. So there's this subcategory of  
12 publishing companies that are independent publishers; am I  
13 right?

14 THE WITNESS: Yes.

15 THE COURT: How many of those had an agency agreement  
16 with Amazon?

17 THE WITNESS: With Amazon? As far as I know, but I'm  
18 not sure that I actually know the answer to that question --  
19 maybe I should just say I really don't know the answer to that  
20 question.

21 THE COURT: If they didn't have an agency agreement  
22 with Amazon and were selling through Amazon on a wholesale  
23 basis, who was setting the price for their books?

24 THE WITNESS: Amazon.

25 THE COURT: And if they had an agency agreement with



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Burtis - redirect

1 Apple in order to be on the iBookstore, that agency agreement  
2 had an MFN, I take it?

3 THE WITNESS: As far as I know, yes.

4 THE COURT: And so the price on their Apple platform  
5 in the iBookstore would, if the price in the Amazon bookstore  
6 were lower, would have to match that lower price; is that  
7 right?

8 THE WITNESS: Absolutely, yes.

9 THE COURT: You said you defined a self publisher as  
10 someone where the name was the same for the author and the  
11 publisher; am I right?

12 THE WITNESS: That's correct.

13 THE COURT: What if the publisher line was blank?

14 THE WITNESS: I don't think we counted it.

15 THE COURT: As a self publisher?

16 THE WITNESS: As a self publisher.

17 THE COURT: And what if the publisher line was filled,  
18 but it was like John Smith, Inc.?

19 THE WITNESS: Right.

20 THE COURT: The author's name but an incorporation.

21 THE WITNESS: Oh, hmm. We tried to do some cleaning  
22 of names, but there were many, many, many, and so I can't tell  
23 you that everyone like that got caught, but there was certainly  
24 an attempt to catch those kinds of things.

25 THE COURT: Thank you. Counsel, does the government

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Burtis - redirect

1 have any additional questions based on the questions I've  
2 placed?

3 MR. BUTERMAN: Just one, your Honor.

4 RECROSS EXAMINATION

5 BY MR. BUTERMAN:

6 Q. Dr. Burtis, do you know if Apple consistently enforced the  
7 MFN?

8 A. I do not.

9 MR. BUTERMAN: Okay. Thank you.

10 REDIRECT EXAMINATION

11 BY MR. SWANSON:

12 Q. Dr. Burtis, with respect to independent publishers who are  
13 under agency with Apple and wholesale with Amazon, if the  
14 Amazon wholesale agreement has an MFN, will the price set by  
15 the agent on Apple control the Amazon price with the MFN?

16 MR. BUTERMAN: Objection, I'm sorry.

17 THE COURT: Do you understand that question?

18 THE WITNESS: Can you repeat it? Sorry. I don't  
19 think I heard the first part.

20 Q. Okay. With respect to independent publishers, I believe  
21 the subject of the Court's questioning, who are on agency with  
22 Apple --

23 A. Mmm, hmm.

24 Q. -- and wholesale with Amazon, and there was a question  
25 about the Apple MFN --

D6JPUSA2

Burtis - redirect

1 A. Mmm, hmm.

2 Q. -- I'm asking you a question about an Amazon MFN in the  
3 wholesale agreement. How would that effect pricing with  
4 respect to that particular independent publisher?

5 MR. BUTERMAN: Objection.

6 THE COURT: Sustained.

7 MR. SWANSON: Thank you.

8 THE COURT: I mean, I want to make sure here. I'm  
9 unaware of any record evidence that when you have a wholesale  
10 relationship, that there is an MFN clause. So if I'm missing  
11 something here, please, that's the basis for my cutting this  
12 off because I don't know that that captures anything I've heard  
13 about in the real world.

14 MR. SWANSON: I just need to check the Amazon  
15 testimony. I was under the impression that their adherence to  
16 MFN was in the post-Apple world, was quite comprehensive.

17 THE COURT: On a wholesale model?

18 MR. SWANSON: In all models.

19 THE COURT: Okay. Thank you. Doctor, you may step  
20 down. Thanks so much.

21 (Witness excused)

22 MR. FLOYD: Your Honor, we have a couple of, I guess,  
23 almost housekeeping matters. This is Dan Floyd. One is we  
24 want to offer the direct testimony of Madeline McIntosh, which  
25 is DX713.

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Burtis - redirect

1 THE COURT: Received.

2 (Defendant's Exhibit 713 received in evidence)

3 MR. FLOYD: And the Exhibit DX726, which are the  
4 slides that were used in the opening, we'd like to put those  
5 into evidence.

6 THE COURT: Well, I wanted copies of them, and thank  
7 you.

8 MR. FLOYD: Yes. Let me hand them up.

9 THE COURT: Okay. I don't --

10 MS. RUBIN: Your Honor, you've already been provided  
11 with an electronic copy of Apple's slides. They just haven't  
12 been marked as an exhibit.

13 MR. FLOYD: I can provide you with a hard copy now, if  
14 that would be helpful.

15 THE COURT: Great. And I did want copies. I do have  
16 copies. Thank you. I don't think they're evidence unless  
17 they're demonstratives, unless they summarize or display. For  
18 instance, a lot of them, as I remember, were legal arguments  
19 and capturing legal concepts.

20 MR. FLOYD: That's fine, your Honor. We have them  
21 admitted on that basis, for demonstrative. However your Honor  
22 intended to use them, we just wanted to mark them as exhibits  
23 and have them in the record for the purpose that you were going  
24 to use them.

25 THE COURT: Fine. We'll have them received then just

D6JPUSA2

Burtis - redirect

1 so we have, not as an evidentiary basis when they shouldn't be,  
2 but just so we have this record captured of slides used with  
3 the opening.

4 MR. FLOYD: Thank you. And then --

5 THE COURT: And their number is?

6 MR. FLOYD: 726.

7 THE COURT: Thank you.

8 (Defendant's Exhibit 726 received in evidence)

9 MR. FLOYD: And then there were a series of exhibits  
10 that we shared with the government this morning, kind of a  
11 cleanup. I have a list. In the interest of time, if it would  
12 be possible to provide the list and have that incorporated into  
13 the record. I have a copy of it. I'll show it to  
14 Mr. Buterman, but we provided the copies, went through all of  
15 them.

16 THE COURT: Great.

17 MR. FLOYD: And there were no objections.

18 THE COURT: Good. And so if you give me the original  
19 of that, I'll treat it as a stipulation then and give it  
20 today's date; so there will be a record of actually what's  
21 happened here.

22 MR. FLOYD: Very much appreciate it. Thank you.

23 THE COURT: Yes.

24 MR. FLOYD: All right.

25 THE COURT: And this is a document that the heading is

D6JPUSA2

Burtis - redirect

1 "DX Exhibits to be Admitted 6-19-13," and I'm signing it now.

2 Next?

3 MS. RUBIN: Your Honor, Apple calls Robert McDonald to  
4 the stand as its next witness.

5 THE COURT: Sir, if you could step up to the witness  
6 stand and remain standing.

7 ROBERT BRUCE McDONALD,

8 called as a witness by the Defendants,

9 having been duly sworn, testified as follows:

10 THE COURT: State your full name and spell your last  
11 name for the record.

12 THE WITNESS: Robert Bruce McDonald. Last name,  
13 M-c-D-o-n-a-l-d.

14 THE COURT: So, Mr. McDonald, you're being handed a  
15 declaration, which has the number DX723, and I want to ask you,  
16 is that your signature on the 24th page?

17 THE WITNESS: Yes, it is.

18 THE COURT: And it's dated April 25th. Is that the  
19 date you signed this?

20 THE WITNESS: Yes.

21 THE COURT: Now, before signing this document, did you  
22 read it carefully?

23 THE WITNESS: I did.

24 THE COURT: And do you swear to the truth of its  
25 contents?

D6JPUSA2

Burtis - redirect

1 THE WITNESS: I do.

2 THE COURT: Any objection to receipt of DX723?

3 MR. BUTERMAN: Your Honor, the United States -- there  
4 are a number of paragraphs in Mr. McDonald's declaration that,  
5 as long as the understanding is that they represent  
6 Mr. McDonald's opinions, as opposed to some statements of  
7 facts, which we do not necessarily believe that Mr. McDonald  
8 has the ability to render, we don't have objections.

9 For example, paragraph 20, we believe that there's a  
10 hearsay problem, but if that paragraph is not coming in for the  
11 truth of the matter being asserted, but rather, a  
12 representation of Mr. McDonald's opinion, we have no problem  
13 with the sentence.

14 THE COURT: For instance, publishers were optimistic  
15 about something?

16 MR. BUTERMAN: Yes.

17 THE COURT: Publishers were hopeful?

18 MR. BUTERMAN: Yes.

19 MS. RUBIN: Your Honor, may I be heard?

20 THE COURT: Yes.

21 MS. RUBIN: Your Honor, it's my understanding that the  
22 government's objections on hearsay grounds are solely as to  
23 paragraph -- a sentence in paragraph 20, the one to which your  
24 Honor was just referring, as well as to a sentence in paragraph  
25 31. Mr. Buterman, is that correct?

D6JPUSA2

Burtis - redirect

1 MR. BUTERMAN: I -- As I just said, your Honor, as  
2 long as these aren't being introduced for the truth of the  
3 matter being asserted, we don't have a problem.

4 MS. RUBIN: Sure. We just wanted some clarification  
5 if we could that those are the only paragraphs to which the  
6 government was asserting.

7 MR. BUTERMAN: I was planning on going through my  
8 objections, your Honor, but those are the only two.

9 THE COURT: So I take it there's agreement among the  
10 parties that I am to receive those sections that would  
11 otherwise draw a hearsay objection, not for the truth?

12 MS. RUBIN: Yes, your Honor. Thank you.

13 THE COURT: And on that understanding, DX723 is  
14 received.

15 MR. BUTERMAN: Oh.

16 THE COURT: Oh, is there --

17 MR. BUTERMAN: Yes, there are other issues, your  
18 Honor, I apologize.

19 THE COURT: Mr. Buterman.

20 MR. BUTERMAN: There are several paragraphs, as I  
21 mentioned, where Mr. McDonald makes statements. For example,  
22 in paragraph 31 -- and I have an overarching issue with 31,  
23 which I'll raise in a moment -- but Mr. McDonald says, "these  
24 innovations have fundamentally transformed the digital reading  
25 experience."



D6JPUSA2

Burtis - redirect

1           As long as these are understood these are  
2       Mr. McDonald's opinions, the United States does not have a  
3       problem with their admission.

4           THE COURT: Any problem from Apple receiving it on  
5       that basis?

6           MS. RUBIN: No, your Honor. And thank you.

7           MR. BUTERMAN: And I can list the rest of the  
8       paragraphs, but it really pervades the entire document. We  
9       don't -- we are not trying to strike Mr. McDonald's personal  
10      beliefs here. We just want to make sure that it's understood  
11      it's just that.

12          THE COURT: Well, he's a lay witness, not an expert,  
13      and I'm not -- and I don't understand that Apple is contending  
14      he should be converted into an expert witness. So with that  
15      understanding DX7 -- Oh, there's more?

16          MR. BUTERMAN: One more, your Honor.

17          THE COURT: Thank you. More.

18          MR. BUTERMAN: I apologize. This is the last one.

19          Paragraph 31 of Mr. McDonald's declaration largely --  
20      and I want to use the qualification "largely" -- refers to a  
21      comparison between the iBookstore and iBooks versus physical  
22      devices, reading books, physical books. We do not believe  
23      that's a relevant issue in this case.

24          THE COURT: I'm not going to strike it.

25          MR. BUTERMAN: Okay. I'll inquire into it.

D6JPUSA2

Burtis - redirect

1 THE COURT: Okay. Good.

2 MR. BUTERMAN: Thank you.

3 THE COURT: DX723 is received with those modifications  
4 or observations.

5 (Defendant's Exhibit 723 received in evidence).

6 CROSS-EXAMINATION

7 BY MR. BUTERMAN:

8 Q. Good morning, Mr. McDonald.

9 A. Good morning.

10 Q. I don't know if you remember me. We did meet at your  
11 deposition several months ago. I am Lawrence Buterman, and I'm  
12 an attorney with the United States.

13 Mr. McDonald, before we get into the substance too  
14 deep, I do want to address one point. Could you turn to  
15 paragraph 17 of your declaration? Do you have that, sir?

16 A. Yes.

17 Q. And do you see that you write in there, I believe it's the  
18 third sentence, that, "Next week Mr. Moerer asked me to arrange  
19 in-person meetings with each CEO for Mr. Moerer, Mr. Cue and  
20 Kevin Saul, counsel for Apple, to meet individually at the  
21 offices of each publisher in New York the following week, on  
22 December 16 and 17." Do you see that, sir?

23 A. I do.

24 Q. Sir, are you aware that the meetings with the publishers  
25 took place on December 15th and 16th, and not 16th and 17th?

D6JPUSA2

McDonald - cross

1 A. I don't recall specifically.

2 Q. Before you wrote this sentence, did you check to see  
3 whether -- what date those meetings took place?

4 A. I did.

5 THE COURT: You did or didn't?

6 THE WITNESS: I did.

7 THE COURT: You did. Thank you.

8 Q. Okay. You do understand that that sentence is incorrect?

9 A. At the time I wrote this, that's the date I found.

10 Q. Now, Mr. McDonald, could you turn to Paragraph 22 of your  
11 declaration, and I'm looking on Page 11, the sentence that  
12 begins with the words "While it is difficult;" do you see that?

13 A. I do.

14 Q. And you testified, "While it is difficult to obtain  
15 definitive information on market share, our best estimate that  
16 the iBookstore comprises roughly 17 to 20 percent of the U.S.  
17 eBook business." Do you see that, sir?

18 A. I do.

19 Q. And do you stand by that sentence, sir?

20 A. I do.

21 Q. Are you aware that Mr. Cue testified at trial last week and  
22 earlier this week, and during his testimony, he said that  
23 Apple's market share was 25 percent?

24 A. I am.

25 Q. And you disagree with Mr. Cue?

D6JPUSA2

McDonald - cross

1 A. I do. In this context, yes.

2 Q. Sir, you are currently the manager of the US iBookstore at  
3 Apple?

4 A. Yes.

5 Q. And you have been part of the iBookstore management team  
6 since it launched; is that correct?

7 A. Correct.

8 Q. You currently have primary responsibility for the  
9 day-to-day operations of the iBookstore; is that correct?

10 A. Yes.

11 Q. And included in that responsibility is managing the  
12 promotions and sales of eBooks --

13 A. Yes.

14 Q. -- correct? You've worked at Apple for eight years?

15 A. Yes.

16 Q. And you report directly to Keith Moerer?

17 A. Yes.

18 Q. And Mr. Moerer is the director of iTunes, correct?

19 A. Correct.

20 Q. Could you turn to paragraph 8 of your declaration, sir? Do  
21 you see that in the second sentence you write, "When we opened  
22 our iBookstore in April 2010, 60,000 eBook titles were  
23 available to the consuming public"?

24 A. Yes.

25 Q. "Today, readers can download more than 1.5 million eBooks;"

D6JPUSA2

McDonald - cross

1 do you see that, sir?

2 A. I do.

3 Q. And that follows a sentence that you write, which you say  
4 based on your personal experience, "Apple's decision to launch  
5 an iBookstore has fundamentally transferred the eBook market,"  
6 correct, sir?

7 A. Correct.

8 Q. Now, sir, the growth in number of titles that you're  
9 referring to, from 60,000 to 1.5 million, that's the growth  
10 that took place on Apple's iBookstore, correct?

11 A. Correct.

12 Q. So, in other words, 60,000 eBook titles were -- There were  
13 more than 60,000 eBook titles available to the consuming public  
14 in April of 2010, correct?

15 A. That's correct.

16 Q. And just so we're clear, the growth that you're talking  
17 about is just the growth that took place on the iBookstore,  
18 correct?

19 A. The growth in catalog, correct.

20 Q. Now, could you turn to paragraph 10 of your declaration,  
21 sir? And you testify in paragraph 10 of your declaration that  
22 the eBooks business was a growth industry before Apple entered  
23 it, correct?

24 A. Which sentence are you referring to?

25 Q. I think you can read through the entire paragraph and tell

D6JPUSA2

McDonald - cross

1 me whether you believe that the eBooks business was a growth  
2 industry before Apple entered?

3 A. Okay.

4 Q. And you see there's a sentence in there that says that,  
5 "The industry reports I saw showed that the sales of eBooks  
6 were increasing"?

7 A. Yes.

8 Q. And as early as 2008, it was your view that the growth of  
9 eBooks was only likely to accelerate, correct?

10 A. Correct.

11 Q. Now, if you look at paragraph 16 of your declaration, in  
12 paragraph 16 of your declaration you discuss the fact that the  
13 growth in eBooks went from one percent to four -- to five  
14 percent of large publisher revenue in just one year. Do you  
15 see that, sir?

16 A. Yes.

17 Q. And so given this tremendous -- this trend of tremendous  
18 growth, you're not suggesting that all new eBook titles since  
19 April of 2010, are the result of Apple's entry, correct?

20 MS. RUBIN: Objection.

21 THE COURT: Overruled.

22 A. Can you repeat the question, please?

23 Q. Given this growth that you note in paragraph 16, you're not  
24 suggesting that all new eBook titles since April of 2010 are  
25 the result of Apple's entry, correct?

D6JPUSA2

McDonald - cross

1 A. No.

2 Q. In fact, you don't know how many eBook title may or may not  
3 have been available, may or may not have become available as a  
4 result of Apple's entry, correct?

5 A. Can you rephrase the question, please?

6 Q. Sure. You can't tell us how many eBook titles came onto  
7 the market specifically because of Apple's entry in 2010,  
8 correct?

9 A. I can't at this time.

10 Q. You cannot?

11 A. I cannot at this time, no.

12 Q. Now, looking at paragraph 14 of your declaration, sir, I  
13 just want to make sure I understand your testimony correctly.  
14 Is it your testimony that you believe that the iPod touch and  
15 the iPhone provide a better reading experience than existing  
16 e-readers in 2009?

17 A. I do believe that, yes.

18 Q. And that included the Amazon Kindle?

19 A. I do.

20 Q. And the Barnes and Noble NOOK?

21 A. I believe so, yes.

22 Q. Now, sir, isn't it true that in 2009, prior to Apple's  
23 entry, there were a variety of e-reader apps that were already  
24 available to consumers on Apple's devices, including the iPhone  
25 and the iPod touch?

D6JPUSA2

McDonald - cross

1 A. That's correct.

2 Q. Amazon's Kindle reader was one of those apps, correct?

3 A. Yes.

4 Q. Barnes and Noble's NOOK e-reader app was one of those,  
5 correct?

6 A. Yes.

7 Q. Kobo's e-reader app also existed prior to Apple's entry,  
8 correct?

9 A. I believe so.

10 Q. And there were also other e-reader apps, were there not,  
11 including Stanza in Fictionwise that were available prior to  
12 Apple's entry?

13 A. Yes.

14 Q. And, in fact, the Stanza e-reader app had been downloaded  
15 approximately 500,000 times as of December 2008, correct?

16 A. I don't recall.

17 Q. Does that number sound out of whack to you?

18 A. It does not.

19 Q. And those e-reading apps from Amazon, Barnes and Noble,  
20 Sony and others, they continue to be available on Apple's  
21 devices today, including the iPad, correct?

22 A. Yes.

23 Q. And to your knowledge, at no point in time during Apple's  
24 consideration of whether to enter the eBooks market, did Apple  
25 intend to forbid other providers of e-reader apps from making



D6JPUSA2

McDonald - cross

1 their products available to consumers on the iPad, correct?

2 A. Not that I'm aware of.

3 Q. In other words, regardless of whether Apple launched the  
4 iBookstore, e-reader apps would have still been available on  
5 the Apple App Store and available to iPad users, correct?

6 A. That's correct.

7 Q. And the iPad, to your knowledge, would have launched  
8 regardless of whether Apple launched its own e-reader app,  
9 correct?

10 A. I assume so.

11 Q. Now, you testified in paragraph 40 of your declaration that  
12 Apple developed software innovations that arose from Apple's  
13 launching of the iBookstore; is that correct?

14 A. Where in that paragraph are you referring?

15 Q. "Apple's technical innovations all arising from Apple's  
16 launching of the app bookstore have expanded the various ways  
17 that various retailers now compete in the eBooks industry"?

18 A. Correct.

19 Q. And, for example, if you look at paragraph 26 of your  
20 declaration, you testified that Apple has added eBooks not  
21 available in physical form, like eBooks enhanced with audio and  
22 video, correct, sir?

23 A. Correct.

24 Q. But, sir, in 2009, prior to Apple's entry, there were  
25 eBooks with audio and video capability; were there not?

D6JPUSA2

McDonald - cross

1 A. I'm not sure.

2 Q. Well, there were certainly eBooks in Apple's App Store that  
3 had audio and video capability, correct, sir?

4 A. I think that's probably correct.

5 Q. And, in fact, even after Apple launched its iPad, isn't it  
6 true, sir, that Amazon offered eBooks with embedded audio and  
7 video before Apple did?

8 A. That's correct.

9 Q. And isn't it the case that the first version of iBooks that  
10 went to consumers did not expressly support books with embedded  
11 audio and video?

12 A. That's correct.

13 Q. And wouldn't you agree with me, sir, that enhanced --  
14 eBooks enhanced with audio and video represent only a small  
15 percentage of eBooks sold on the iBookstore?

16 A. Can you define small?

17 Q. Do you believe it's a large percentage, sir?

18 A. I do not believe it's a large percentage.

19 Q. Now, if you look at paragraph 30 of your declaration, you  
20 testified that Apple's iBookstore transformed eBooks from  
21 rudimentary black and white text; isn't that right, sir?

22 THE COURT: Page 13, the bottom.

23 THE WITNESS: Thank you.

24 A. And which sentence are you referring to?

25 THE COURT: The first sentence.

D6JPUSA2

McDonald - cross

1 THE WITNESS: Okay.

2 A. Correct.

3 Q. But in 2009, prior to Apple's entry, eBooks with color  
4 capabilities did exist, correct?

5 A. I'm not sure.

6 Q. Well, for example, eBook apps with color capabilities  
7 existed or eBooks with color capabilities existed in Apple's  
8 App Store, correct?

9 A. I'm not sure.

10 Q. You have no reason to doubt that they did, though, correct?

11 A. No.

12 Q. And, in fact, sir, isn't it true that on the day that the  
13 iPad launched, consumers could read eBooks in color through the  
14 Kindle app, the same way that they could read them through the  
15 iBooks app?

16 A. That's correct.

17 Q. And, sir, prior to Apple's entry, Amazon introduced its  
18 Kindle app for the PC, correct?

19 A. I don't recall.

20 Q. Let me hand you an exhibit. This is PX904. And, sir, do  
21 you see PX904 is a press release entitled "Introducing Kindle  
22 for PX"?

23 MS. RUBIN: I'm sorry, counsel. I don't believe we  
24 received a copy.

25 MR. BUTERMAN: Oh, I thought you had.

D6JPUSA2

McDonald - cross

1 MS. RUBIN: Thank you very much. I'm sorry, your  
2 Honor.

3 Q. Do you see PX904 is a press release entitled, "Introducing  
4 Kindle for PC, a free application for reading Kindle books with  
5 PC"?

6 A. Yes.

7 Q. And it's dated October 22nd, 2009?

8 A. Correct.

9 MR. BUTERMAN: Your Honor, we'd like to move PX904  
10 into evidence.

11 MS. RUBIN: No objection, your Honor.

12 THE COURT: Received.

13 (Plaintiff's Exhibit 904 received in evidence)

14 Q. So prior to Apple's entry, Amazon introduced its Kindle app  
15 for the PC, correct?

16 A. Correct.

17 Q. And once Amazon introduced its Kindle app for the PC,  
18 consumers could read eBooks on the PC with color capabilities,  
19 correct?

20 A. Correct.

21 Q. And prior to Apple's launch of the iBookstore in April of  
22 2010, Amazon also launched its Kindle for Mac application,  
23 correct?

24 A. I don't recall the dates.

25 Q. Okay. Sir, can you turn to PX621 in the binder that I just

D6JPUSA2

McDonald - cross

1 handed to you? And, sir, do you see that PX621 is a press  
2 release entitled, "Introducing Kindle for Mac, the free  
3 application for reading Kindle books on the Mack now available  
4 in 100 countries"?

5 A. Yes.

6 Q. And the date of that is March 18th, 2010, correct, sir?

7 A. Correct.

8 Q. And that is before Apple's bookstore launch, correct?

9 A. Yes.

10 Q. And --

11 THE COURT: Is this in evidence, counsel?

12 MR. BUTERMAN: Yes, it is, your Honor.

13 Q. If you'd look at the document, do you see -- if you scroll  
14 down to the sentence that begins with "Kindle for Mac readers  
15 can take advantage of the following features," and then there  
16 are a bunch of dots?

17 A. Yes.

18 Q. And you see that the third dot says, "Choose from 10  
19 different font sizes and adjust words per line"? Do you see  
20 that, sir?

21 A. I do.

22 Q. And do you see the fifth dot says, "View notes and  
23 highlights marked on Kindle, Kindle DX and Kindle for iPhone"?

24 A. Yes.

25 Q. And do you see the last one says, "Read books in full

D6JPUSA2

McDonald - cross

1 color, including children's books, cookbooks, travel books and  
2 textbooks"?

3 A. Yes.

4 Q. So, sir, it's fair to say that the ability to read eBooks  
5 in color is not a technical innovation arising out of Apple's  
6 launching of the iBookstore, correct?

7 A. We were not the first to introduce color.

8 Q. By the way, sir, this is a -- introducing a Kindle for Mac  
9 application, can you read books from the iBookstore on a Mac?

10 A. Not yet.

11 Q. And you can't read books from the iBookstore on a PC  
12 either, correct, sir?

13 A. That's correct.

14 Q. So can we now look at paragraph 31 of your declaration?  
15 And you say in paragraph 31, "At Apple, we believe that paying  
16 close attention to the details of the individual reader  
17 experience is critical to win the competition with physical  
18 books for the loyalty of a reader."

19 To that end, Apple has introduced or improved the  
20 following features and functionality through the iBooks app for  
21 eBooks when utilized on an Apple device." Do you see that,  
22 sir?

23 A. I do.

24 Q. So is it fair to say -- And you can take a look at the rest  
25 of paragraph 31, which goes on for a little bit. Is it fair to

D6JPUSA2

McDonald - cross

1 say that what follows after that introductory sentence is your  
2 discussion of a number of features and functionality that you  
3 believe Apple either introduced or improved through its  
4 e-reading software?

5 A. Correct.

6 Q. And you certainly aren't claiming that Apple created all of  
7 these?

8 A. Not all of these, correct.

9 Q. And looking at -- And you are doing a comparison here of  
10 the reading experience on the -- using the iBooks app versus  
11 reading a physical book, correct, sir?

12 MS. RUBIN: Objection.

13 THE COURT: Overruled.

14 Q. Isn't that what you say in the first sentence, sir?

15 A. Correct.

16 Q. And sitting here today, sir, and looking at paragraph 31,  
17 can you tell me which, if any, of the features that you  
18 mentioned in paragraph 31 would not be available to the public  
19 if Apple had not -- had launched its iPad but not its  
20 iBookstore?

21 A. Can you repeat the question, please?

22 Q. Sure. Sitting here today, and looking at paragraph 31, can  
23 you tell me which, if any, of the features that you list here  
24 would be unavailable to the public if Apple had launched the  
25 iPad but not an iBookstore?

D6JPUSA2

McDonald - cross

1 A. Sure. And I need to work -- to read through this, and  
2 you're just asking whether it was available and not improved,  
3 correct?

4 Q. I'm just wondering, if we lived in a world where there was  
5 no iBookstore but there was an iPad, whether you can tell me  
6 definitively that we wouldn't have some of these bulleted  
7 features and functionalities that you discuss in paragraph 31?

8 MS. RUBIN: Objection.

9 THE COURT: Overruled.

10 A. I'm going to take my time reading through this.

11 Q. Well, you know what, sir, because -- let me see if I can  
12 move us along. Okay?

13 A. Sure.

14 Q. So let me just ask some specific questions.

15 A. Okay.

16 Q. And at the end, if you want to come back to answering this  
17 question, we can come back to it. So in paragraph 31, one of  
18 the things you testify about is that Apple software allows  
19 readers to select from a large variety of fonts and customize  
20 font size, correct, sir?

21 A. Correct.

22 Q. And as we just saw a few moments ago, Amazon's Kindle app  
23 for the Mac allowed that, sir; did it not?

24 A. It did.

25 Q. And, in fact, Amazon's Kindle app for the iPad, the first



D6JPUSA2

McDonald - cross

1 Kindle app for the iPad that came out the day that the iPad  
2 launched, the day that the iPad actually went to market,  
3 allowed for choice in customizations of fonts; did it not?

4 A. Correct.

5 Q. Now, you also testified that Apple's software allows  
6 readers to change the background color of the book pages from  
7 white to sepia, correct, sir?

8 A. Correct.

9 Q. But, again, Amazon's first Kindle app for the iPad also  
10 allowed readers to change the background color of the -- of  
11 book pages, correct, sir?

12 A. Correct.

13 Q. And, indeed, Mr. McDonald, Apple was quite envious of the  
14 Kindle app's sepia look because Amazon did it first; isn't that  
15 true?

16 A. I can't say.

17 Q. I'm going to hand you what we've marked as PX902. And,  
18 sir, do you see PX902 as a e-mail, as an Apple e-mail?

19 A. Yes.

20 Q. And it's an e-mail entitled, "SJ iBooks review notes,  
21 April 5th, 2010"?

22 A. Correct.

23 Q. That's a couple of days after the iBookstore's launch,  
24 correct, sir?

25 A. Yes.

D6JPUSA2

McDonald - cross

1 Q. And the SJ, you understand to be Steve Jobs?

2 A. I assume so.

3 Q. And you see that the e-mail was written from a Bill

4 Bachman. Do you know who Mr. Bachman is?

5 A. I do.

6 Q. And who is he?

7 A. I believe he was in charge of some of the design elements  
8 of iBooks -- of the iBooks, the app.

9 Q. And Mr. Bachman is writing to several high-level people at  
10 Apple, correct?

11 A. Correct.

12 Q. Including Mr. Cue and Mr. Forstall; is that correct?

13 A. Correct.

14 MR. BUTERMAN: Your Honor, we'd like to offer PX902  
15 into evidence.

16 MS. RUBIN: No objection, your Honor.

17 THE COURT: Received.

18 (Plaintiff's Exhibit 902 received in evidence)

19 Q. And do you see that Mr. Bachman writes, "Here are my notes  
20 of Monday's SJ review of iBooks"?

21 A. Yes.

22 Q. And it goes on to say that Mr. Jobs spent the first part of  
23 the meeting comparing two different books on two different  
24 iPads, one with the iBooks and one with the Kindle app. Do you  
25 see that, sir?

D6JPUSA2

McDonald - cross

1 A. Yes.

2 Q. And then it goes on to say, "Overall, he thinks Amazon did  
3 a good job with the app and felt it was worthy having us study  
4 it." Do you see that, sir?

5 A. I do.

6 Q. And then there's some more details on that, are there not?

7 A. Yes.

8 Q. For example, the first bullet after that says, "For  
9 appearance settings, he likes the look of their default page  
10 with text at 75 percent black." Did I read that correctly,  
11 sir?

12 A. Yes.

13 Q. "He likes the font Georgia and is interested in having us  
14 add it." Do you see that, sir?

15 A. I do.

16 Q. And "He doesn't like their white text on black page, but he  
17 does like the look of their sepia, and he is interested in us  
18 looking into adding sepia." Do you see that, sir?

19 A. I do.

20 Q. So isn't it a fact, sir, that Apple's sepia feature in  
21 iBooks wasn't an innovation at all?

22 A. We didn't come out with it first, correct.

23 Q. In fact, Apple just copied it from Amazon, correct?

24 A. I can't speak to the nature of how we implemented it.

25 Q. But that's what the document indicates, sir; does it not?

D6JPUSA2

McDonald - cross

1 A. That's what this document indicates, correct.

2 Q. And so would you agree with me, sir, that at the very  
3 least, the part of your declaration that talks about changing  
4 the color of book pages from white to sepia as being an  
5 innovation of the iBooks app isn't entirely accurate?

6 A. Yes.

7 Q. Now, you also mentioned in paragraph 31 of your  
8 declaration, the optional page curl feature that simulates the  
9 physical book experience and let's the reader turn the page,  
10 correct, sir?

11 A. Yes.

12 Q. But Amazon's first Kindle app for the iPad also included an  
13 optional page turn animation; did it not?

14 A. I'm not sure.

15 Q. Sir, I'm going to hand you what's been marked as PX899.

16 And, sir, do you see PX899 as a Amazon.com announcement of the  
17 Kindle app for the iPad?

18 A. Yes.

19 Q. And it is dated April 2nd, 2010, sir?

20 A. Yes.

21 MR. BUTERMAN: We'd like to offer PX899, your Honor.

22 MS. RUBIN: No objection. I'm sorry, your Honor.

23 THE COURT: Received.

24 (Plaintiff's Exhibit 899 received in evidence)

25 Q. And, sir, April 2nd, 2010, is that the day before the iPad

D6JPUSA2

McDonald - cross

1 became available?

2 A. That's the day before the iBookstore was launched.

3 Q. And do you see that, if you look at the bullets, the  
4 features of the Kindle app for the iPad, that if you look down,  
5 the fourth one talks of page-turn animation? Do you see that,  
6 sir?

7 A. I do.

8 Q. So Kindle app for iPad offers an interactive experience  
9 with page-turn animation designed to replicate the look of a  
10 book -- of a page turning in a book, and then it goes on to say  
11 that customers who prefer a simple, unadorned reading  
12 experience can choose the basic reading mode option and turn  
13 off the animation. Did I read that correctly, sir?

14 A. Yes.

15 Q. And, in fact, Mr. McDonald, isn't it true that page-turn  
16 animation was something that Apple was aware of as early as  
17 February of 2009, as a feature that publishers were putting  
18 into iBooks that they were selling on the App Store?

19 A. I don't know.

20 Q. Bear with me for one second, sir. Sir, I'm handing you  
21 what's been marked as PX901?

22 MS. RUBIN: And again, counsel, can we have a copy?

23 MR. BUTERMAN: I'm getting it.

24 MS. RUBIN: Thanks so much.

25 Q. And, sir, do you see that PX901 is entitled "Penguin U.S.

D6JPUSA2

McDonald - cross

1 iPhone app"?

2 A. Yes.

3 Q. And, sir, do you see that if you turn to Page 3 of the  
4 document, it says under 1.1 features, the 1.1 version of  
5 Penguin's U.S. app was submitted in April -- excuse me, was  
6 submitted to Apple in mid-February 2009? Do you see that?

7 A. I do.

8 Q. And then it says the version of the Apple contained the  
9 following additional features; do you see that, sir?

10 A. I do.

11 Q. And then if you go, look at the last of the bullets, it  
12 says, "Excerpt reader functionality has been expanded to  
13 include portrait or landscape reading, automatic text reflow,  
14 five different font sizes, page-turning animation;" do you see  
15 that, sir?

16 A. I do.

17 MR. BUTERMAN: Your Honor, we'd like to offer PX901  
18 into evidence.

19 MS. RUBIN: No objection, your Honor.

20 THE COURT: Received.

21 (Plaintiff's Exhibit 901 received in evidence)

22 Q. Now, sir, you had also -- Well, so, sir, let me ask you  
23 again. When you list in your declaration the page-curl feature  
24 among the innovations that resulted from the iBooks app, that  
25 too is not entirely accurate, correct, sir?

D6JPUSA2

McDonald - cross

1 A. Well, I qualify that as either introduced or improved.

2 Q. Sitting here today, you can't explain how Apple's page  
3 turn, page curl improved upon either the page curl that Penguin  
4 sent to Apple in February of 2009 or that Amazon had on its  
5 Kindle app for the iPad in April of 2010, correct, sir?

6 A. That's correct.

7 Q. And when you list in your declaration a large variety of  
8 fonts and customizable font sizes among the innovations that  
9 result from the iBooks app, that too is not entirely accurate,  
10 correct, sir?

11 A. Again, it did not introduce the font selection, but we  
12 improved upon the display fonts.

13 Q. And one of the ways that you improved upon fonts, as we saw  
14 in one of the previous documents, was taking the fonts from  
15 sources like Amazon that you believed looked nice, correct,  
16 sir?

17 A. That was a font that we added, correct.

18 Q. And when you list in your declaration that the integrity of  
19 the layout is preserved when a device is rotated, and you list  
20 that as one of the innovations that resulted from the iBooks  
21 app, that too is not entirely accurate, correct, sir?

22 A. No, I disagree.

23 Q. Well, the Penguin app that we just talked about showed  
24 being able to look at documents in either portrait or landscape  
25 mode, correct, sir?

D6JPUSA2

McDonald - cross

1 A. Correct.

2 Q. And you understood that to be, since it was talking about  
3 an iPhone app, reading with your iPhone either held vertically  
4 or horizontally, correct, sir?

5 A. Correct.

6 Q. Now, you also talk in paragraph 31 about the ability to dim  
7 or increase the backlighting for easy reading at night; do you  
8 not, sir?

9 A. Yes.

10 Q. And Amazon's first Kindle app for the iPad also had the  
11 capability of adjusting the screen's brightness from within the  
12 app; did it not, sir?

13 A. Yes.

14 Q. Now, sir, can we look briefly at paragraph 28 of your  
15 declaration, and I just want to make sure that we're on the  
16 same page here. Just to be clear, you're not claiming that  
17 Apple created concepts of marketing campaigns, such as editor's  
18 picks, best of the month or best of the year, correct, sir?

19 A. That's correct.

20 Q. And you're also not suggesting that these kinds of  
21 marketing campaigns were unavailable at any of your  
22 competitor's eBooks stores prior to April of 2010, correct,  
23 sir?

24 A. That's correct.

25 Q. And similarly, if we look at paragraph 29 of your



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McDonald - cross

1 declaration, you're not claiming that Apple created the concept  
2 of marketing campaigns such as breakout authors or breakout  
3 books, correct, sir?

4 A. That's correct.

5 Q. And you're not claiming that these kinds of marketing  
6 campaigns were unavailable at any of your competitors' eBooks  
7 store prior to Apple's launch, correct, sir?

8 A. Yes.

9 Q. Yes, you're not claiming that?

10 A. That's correct.

11 MR. BUTERMAN: Now, your Honor, would this be an  
12 appropriate time for our break?

13 THE COURT: Sure. Why don't you step down, sir.

14 (Witness excused temporarily)

15 THE COURT: So this is the very unpleasant part of the  
16 trial, with the declining moments. So I'm going to give you --  
17 I'm going to check and confirm during our break where we stand  
18 because, you know, I'm doing this a little on the fly, and I  
19 think that the government has an hour and five minutes left and  
20 Apple has 44 minutes left, something like that.

21 I'm going to confirm it. Okay? I think that should  
22 be sufficient, that it's the rules of the game we've all lived  
23 with for three weeks. That's life.

24 We know a second thing. We're having summations  
25 tomorrow; so the evidentiary record will close today. I'm not

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McDonald - cross

1 doing anything else this afternoon. I don't want to -- I don't  
2 think you need more time, but if there was a joint application  
3 and only a joint application, because everybody's lived with  
4 the same understanding and the same rules, if there was a joint  
5 application and you wanted to, you know, extend the time a  
6 little bit today, fine with me. Okay? Thanks.

7 (Recess)

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McDonald - cross

1 THE COURT: Please be seated.

2 So, is Mr. McDonald around? We'll start when he  
3 returns.

4 Mr. McDonald, you can retake the stand.

5 ROBERT BRUCE McDONALD, resumed.

6 So, my law clerk informed counsel during the break  
7 that my math was wrong and the government has an hour and 14  
8 minutes left and Apple has, as I stated earlier, 44 minutes  
9 left.

10 Counsel -- wait one minute.

11 You may begin.

12 MR. BUTERMAN: Thank you, your Honor.

13 CROSS-EXAMINATION CONTINUED

14 BY MR. BUTERMAN:

15 Q. Mr. McDonald, can you return to paragraph 36 of your  
16 declaration.

17 Do you see, sir, that in paragraph 36 you testify that  
18 "Shortly after Apple launched its iBookstore, Apple began to  
19 create a groundbreaking authoring and publishing software tool  
20 called iBooks Author that would allow virtually anyone to  
21 create compelling books of all types."

22 Do you see that, sir?

23 A. Yes.

24 Q. To be clear, sir, the iBooks Author software was not  
25 available to the public until January 2012, correct, sir?

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McDonald - cross

1 A. That's correct.

2 Q. And that was two years, approximately, after Apple launched  
3 it iBookstore, correct, sir?

4 A. Approximately.

5 Q. And you testified that iBooks Author lowered technical  
6 barriers to entry to create an eBook, correct, sir?

7 A. Yes.

8 Q. But there are other self-publishing tools such as Lulu and  
9 Smashwords that existed prior to iBooks Author, correct, sir?

10 A. I don't think you can compare the self-publishing tools --  
11 I disagree.

12 Q. Sir, my question was there were other self-publishing tools  
13 such as Lulu and Smashwords that already existed prior to  
14 iBooks Author coming onto the market, correct, sir?

15 A. I'm not familiar with the tools that you're referring to.

16 Q. So you don't know whether they existed before --

17 A. I know the organizations existed. I don't know about the  
18 tools you're referring to.

19 Q. So, you would agree with me, though, sir, it's not the case  
20 that the existence of eBook self-publishing tools was a  
21 technical innovation arising out of the launch of the  
22 iBookstore, correct, sir?

23 A. No. I disagree.

24 Q. You're saying that the existence of eBook self-publishing  
25 tools as a technical innovation across the world arose out of

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McDonald - cross

1 the launch of the iBookstore? Is that your testimony, sir,  
2 under oath?

3 A. Can you repeat that sentence that you're referring to,  
4 please.

5 Q. Is it your testimony here today, sir, that the existence of  
6 eBook self-publishing tools was a technical innovation that  
7 arose throughout the world out of the launch of the iBookstore?

8 A. IBookstore or iBooks Author?

9 Q. No. IBookstore, sir.

10 A. I need to read this, please. Where are you referring to?

11 Q. You talk about iBooks Author in paragraphs 37 -- well, 36  
12 but I'm looking at paragraphs 37 and 38.

13 A. Okay. Please.

14 Q. Is it your testimony here, sir, that the existence of eBook  
15 self-publishing tools was a technical innovation that arose  
16 throughout the world as a result of the launch of the  
17 iBookstore?

18 A. Yes.

19 Q. So there may have been self-publishing tools that existed  
20 before iBook -- the iBookstore, correct, sir?

21 A. Correct.

22 Q. And yet your testimony is still that the existence of eBook  
23 self-publishing tools only came about through the iBookstore?

24 A. No. That's incorrect.

25 Q. Okay. So I just want to make sure that we're on the same

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McDonald - cross

1 page here.

2 It is not your testimony that eBook self-publishing  
3 tools was a technical innovation that arose from the launch of  
4 the iBookstore, correct, sir?

5 A. Can you -- are you asking a question? Or are you referring  
6 to something in this document that I can look at?

7 Q. No. I'm asking you a question, sir.

8 A. Okay. Can you repeat the question, please.

9 Q. Sure.

10 It is not your testimony that eBook self-publishing  
11 tools was a technical innovation that arose from the launch of  
12 the iBookstore, correct, sir?

13 A. I think that's correct. I think it's correct that --

14 Q. Thank you.

15 A. Yeah.

16 Q. Now, sir, you testified that iBooks Author has transformed  
17 the book industry, correct?

18 A. Yes.

19 Q. That's your view?

20 A. Yes.

21 Q. And there are 1.5 million eBooks available for consumers to  
22 download just on the iBookstore today, correct, sir?

23 A. The number is 1.8 million now.

24 Q. 1.8 million.

25 Sir, isn't it true that only 18,000 titles have been

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McDonald - cross

1 created using the iBooks Author?

2 A. Now 21,000. Yes.

3 Q. Your declaration at paragraph 38 refers to 18,000, correct,  
4 sir?

5 A. Yes.

6 Q. And so now it's at 21,000 out of 1.8 million; is that  
7 correct, sir?

8 A. Correct.

9 Q. And your testimony is that iBooks Author has transformed  
10 the book industry?

11 A. Do I use those exact words, "transformed the book  
12 industry"?

13 Q. I believe you do, sir.

14 Would you agree with me that that's a slight  
15 exaggeration?

16 A. No. I don't agree.

17 Q. Well, sir, you talk about the book industry. When an  
18 author creates a book using iBooks Author, that book can only  
19 be distributed through the iBookstore, correct?

20 A. That's correct.

21 Q. So, in other words, by using the iBooks Author software, a  
22 consumer -- excuse me. By using -- yes. By using the iBooks  
23 Author software, the user has no choice but to sell the content  
24 on the iBookstore, correct, sir?

25 A. That's correct.

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McDonald - cross

1 Q. The iBookstore, as you testified -- or let me back that up.

2 You testified earlier that Apple has only between 17  
3 and 20 percent of the eBooks market, correct, sir?

4 A. (No response).

5 Q. That was your testimony earlier?

6 A. Yes.

7 Q. Okay. And so you're telling me -- you're testimony this  
8 Court that a product developed two years after the iBookstore  
9 launch, you're telling me that a product that accounts for  
10 21,000 of 1.8 million titles on a store, that only sells  
11 20 percent of the total books that are sold, eBooks that are  
12 sold in the country, transformed the book industry, sir?

13 A. I agree with that, yes.

14 Q. By the way, isn't it the case that Apple's iBook Author was  
15 originally launched to support textbooks, not trade eBooks?

16 A. That was launched with a dozen textbooks. And we also  
17 introduced about four trade titles at that time.

18 Q. It was originally designed -- it was originally launched to  
19 support textbooks primarily, correct, sir?

20 A. I don't think we intended to solely support textbooks at  
21 that time. I think we knew that there would be uses for the  
22 trade part of the business as well.

23 Q. Now, you testified that in -- and you can look at paragraph  
24 33 of your declaration -- that as a direct result of launching  
25 the iBookstore, Apple developed the fixed layout ePub format,



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McDonald - cross

1 also called fixed layout, correct, sir?

2 A. Yes.

3 Q. And isn't it the case that when iBooks first launched,  
4 iBooks 1.0 it did not support fixed layout?

5 A. That's correct.

6 Q. It was only a later version of iBooks that supported fixed  
7 layout, correct, sir?

8 A. That's correct.

9 Q. Now, sir, I want to move on to something slightly  
10 different.

11 You were informed around January 4 that Apple intended  
12 to propose an agency model to the publishers, correct?

13 A. I don't recall the exact date but I believe it was in  
14 January.

15 Q. And you were informed by Mr. Moerer over the phone that  
16 agency was how Apple was going to proceed, correct, sir?

17 A. At some point, yes.

18 Q. And prior to that occasion you did not know that Apple  
19 intended to propose an agency model, correct, sir?

20 A. That's correct.

21 Q. And isn't it true, sir, that at no time in 2009, and  
22 leading up to the signing of the Apple agency agreements, did  
23 any senior executive tell you that Apple would not enter the  
24 eBook market absent agency being the form of business model?

25 MS. RUBIN: Objection, your Honor. It's beyond the

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McDonald - cross

1 scope.

2 MR. BUTERMAN: Your Honor, in paragraph 3 Mr. McDonald  
3 discusses -- sorry. Starting in paragraph 2 he discusses his  
4 responsibilities. He specifically discusses the negotiations  
5 when he talks about in paragraph 16 and 17 the early -- in  
6 paragraph 17, the meetings that he had in December of 2009 with  
7 the publishers. And this is all leading to another  
8 conversation regarding MFNs which is the topic that  
9 Mr. McDonald testifies about in his declaration.

10 THE COURT: Overruled.

11 Q. So, Mr. McDonald, my question was isn't it true that at no  
12 time in 2009 and leading up to the signing of the Apple agency  
13 agreements did any senior executive tell you that Apple would  
14 not enter the eBooks market absent agency being the form of the  
15 business model?

16 A. I don't recall anyone saying that to me.

17 Q. Do you recall being deposed in this matter, sir?

18 A. I do.

19 Q. Mr. McDonald, I'm handing you a copy of your deposition  
20 transcript, okay. I'm going to direct you to a line and a page  
21 and I'm going to ask you just to look at what I direct you to?

22 MR. BUTERMAN: Would your Honor like copies of the  
23 transcript?

24 Q. So, sir, it's in the -- it's on the bottom stack. I want  
25 to direct your attention to page 241, line 21 through 242, line

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McDonald - cross

1 2. I want you to find that, sir, and I just want you to read  
2 it to yourself.

3 A. From which line to which line?

4 Q. From 241, line 21 through 242, line 2. I just want you to  
5 read it to yourself. Not out loud, sir.

6 Now can you put that aside, sir.

7 Now, sir, did reading that passage refresh your  
8 recollection as to whether at any point in time in 2009 and  
9 leading up to the signing of the Apple agency agreements,  
10 whether any senior executive told you that Apple would not  
11 enter the eBook market absent agency being the form of business  
12 model?

13 A. Yes.

14 Q. Can you tell me what the answer to the question is.

15 A. No.

16 Q. Now, once the iBookstore opened, you were the person  
17 initially responsible for managing the five largest publisher  
18 accounts; that is, HarperCollins, Penguin, Macmillan,  
19 Simon & Schuster, and Hachette; is that correct, sir?

20 A. That's correct.

21 Q. And as part of your responsibility managing these accounts  
22 you understood that the Apple agency agreements, including the  
23 application of the pricing MFN clause -- I'm sorry. Let me  
24 start that again.

25 As part of your responsibility managing these

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McDonald - cross

1 accounts, you understood the Apple agency agreements, including  
2 the application of the pricing MFN clause contained in the  
3 agreements, correct, sir?

4 A. That's correct.

5 Q. And Mr. McDonald, you testified in your direct -- and I  
6 believe it's at paragraph 41 -- that from the early days of the  
7 iBookstore, with Apple's encouragement, publishers have  
8 experimented with pricing.

9 Is that accurate, sir?

10 A. That is.

11 Q. But, sir, when you were deposed in this matter you had a  
12 different understanding with respect to eBook titles subject to  
13 the Apple agency agreements, did you not, sir?

14 A. I'm not sure what you're referring to specifically.

15 Q. Well, sir, at the time of your deposition isn't it true  
16 that in your understanding that as a result of the agency  
17 agreements, the price for a particular title, subject to the  
18 agency agreement, would be the same across eBook retailers?

19 A. Can you ask the question again, please.

20 Q. Sure. At the time of your deposition it was your  
21 understanding that as a result of the agency agreements the  
22 price for a particular eBook title that was subject to the  
23 agreements would be the same across eBook retailers, correct?

24 A. I don't recall what I said in my deposition.

25 Q. Okay. Well, if you could pull up the deposition I want you

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McDonald - cross

1 just to look again at -- to yourself at paragraph -- at page  
2 250, lines 2 through 14.

3 Could you close that, sir.

4 Now, does looking at that refresh your recollection as  
5 to what your understanding was regarding the agency agreements  
6 and how they impacted the price of particular eBook titles  
7 subject to the agreements?

8 A. I'm not sure I follow your question.

9 Q. Okay, sir.

10 As a result of the Apple agency agreements with the  
11 pricing MFNs, is Apple able to compete on price with Amazon for  
12 their titles?

13 A. Today?

14 Q. No. After signing the agreements.

15 A. If a publisher has the same price, if it was agency in our  
16 store and agency elsewhere, those prices were the same.

17 Q. And so in other words, sir, after Apple signed its agency  
18 agreements with its MFN and its iBookstore went live, with  
19 respect to the publisher defendants' titles, isn't it true that  
20 the prices were the same?

21 A. Yes.

22 Q. And as a result of the prices being the same, you  
23 understood that there could be no price competition, correct,  
24 sir?

25 MS. RUBIN: Objection.

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McDonald - cross

1 THE COURT: Overruled.

2 THE WITNESS: Can you define price competition and  
3 between whom.

4 Q. Sir, now you can pull open your deposition and I'm going to  
5 read to you the following question and answer. And I want you  
6 to look at page 251 -- actually, we'll start with 250, 2  
7 through 14. Okay, sir. Do you have that?

8 A. Yes.

9 "Q. Fair enough. It was tough to follow.

10 "Do you believe that Apple competes on price with  
11 Amazon for the same titles by the same publisher under an  
12 agency contract?

13 "Mr. Floyd: Objection. Vague and ambiguous.

14 "Mr. Miller: Calls for opinion and conclusion.

15 "The witness: Publisher who has the same price? So  
16 it's agency on our store as well as agency on Amazon.

17 I may be missing the question, but I'm not sure how  
18 you compete price if the price is the same in that case."

19 Did you give that -- excuse me. Did I read that  
20 question and answer correctly?

21 A. You did. Yes.

22 Q. Do you recall giving that testimony?

23 A. I do.

24 Q. And that testimony is true and accurate, correct, sir?

25 A. Yes.

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McDonald - cross

1 Q. And I'd like to you also look at 251, lines 2 through 9.  
2 I'm going to read those also.

3 "Q. I'm not talking about the settling pubs. I'm talking  
4 about the litigating publishers. Are you able to compete on  
5 price with Amazon for their titles?

6 "Mr. Miller: It's vague.

7 "The witness: The price is the same so I may be  
8 missing the question. But I'm not sure you can compete on  
9 price if the price is the same."

10 Did I read that correctly, sir?

11 A. You did.

12 Q. And did you give that testimony during your deposition?

13 A. I did.

14 Q. And was it true and accurate?

15 A. Yes.

16 Q. Now, sir, you can turn -- if you could turn to paragraph --  
17 you can put that aside. Thank you.

18 Mr. McDonald, if you could turn to paragraph 21 of  
19 your declaration. Do you have that, sir?

20 A. I do.

21 Q. And isn't it true, sir, that after the Apple agency  
22 agreements went into effect and the iBookstore was launched,  
23 your team was responsible for enforcing the retail price MFN?

24 A. Initially the first few weeks, I believe, that was handled  
25 by the operations team. But after a few weeks, yes, my team

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McDonald - cross

1 was focused on this, yes.

2 Q. And pursuant to that responsibility your team initially  
3 evaluated for a limited set of titles how the prices at another  
4 retailer, typically Amazon, compared with the prices on the  
5 iBookstore; is that correct?

6 A. That's correct.

7 Q. You say in that sentence, in paragraph 21, "usually." Why  
8 do you use the qualifier usually?

9 A. Well sometimes it was more.

10 The audit that we did of titles happened formally on a  
11 weekly basis, but we were looking at titles on a daily basis.

12 Q. And you weren't looking at all titles, were you, sir?

13 A. No.

14 Q. In fact, you were looking at a limited set of titles,  
15 correct, sir?

16 A. That's correct.

17 Q. And those were a limited set that you chose to look at,  
18 correct, sir?

19 A. Yes.

20 Q. But after your assessment of initial compliance, a decision  
21 was made that employee resources were better spent building the  
22 store rather than enforcing compliance with the MFN; isn't that  
23 so?

24 A. That's right.

25 Q. And as a result, Apple generally does not enforce any of



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McDonald - cross

1 the price matching MFNs in the Apple agency contracts, correct,  
2 sir.

3 A. That's incorrect.

4 Q. Does Apple enforce its price matching MFNs today, sir?

5 A. We talk to publishers where their prices are out of whack.

6 Q. That's something that you continue to do today?

7 A. Yes.

8 Q. Sir, could you turn to page 215 of your deposition.

9 Your deposition was dated -- took place in December of  
10 2012, correct, sir?

11 A. Yes.

12 Q. And could you turn -- so you're on page 215?

13 A. Yes.

14 Q. I'm going to read to you from your deposition starting at  
15 line 15 on 215. Okay. I'd like you to follow with me.

16 "Do you still enforce any of your price matching  
17 MFNs?" That was --

18 "Q. Do you still enforce any of your price matching MFNs?

19 "A. It's not something we've done, to my knowledge, in a  
20 while.

21 "Q. How long is a while?

22 "A. I'd say most of the year.

23 "Q. And that's because you found it was just too costly to  
24 devote the resources?

25 "A. I think it's mainly that. And whether or not it was

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McDonald - cross

1 conscious, I believe it now. And I think the marker is a more  
2 effective way to track that. And if a publisher, you know,  
3 decides to price their books at full list and they don't see  
4 sales, and they're seeing sales elsewhere, they have the  
5 ability to change their own prices. So they may decide to do  
6 so."

7 And then I'd like you to look at page 2 -- let me  
8 stop, sir.

9 Do you recall being asked those questions and giving  
10 those answers?

11 A. I do.

12 Q. And is that testimony truthful?

13 A. Yes.

14 Q. Now I'd like you to look at page 214, lines 4 through 22 of  
15 your deposition.

16 Do you have that, sir?

17 A. I do.

18 Q. I'm going to read again.

19 "Q. How does Apple -- sorry, you're done with that document.  
20 How does Apple go about enforcing its price MFN in its eBook  
21 contracts?

22 "A. For the most part we don't. I think initially we  
23 looked -- we looked at -- on a weekly basis, we would look at a  
24 set, a limited set of titles to see how those -- how that  
25 content was being priced on our store versus elsewhere. We

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McDonald - cross

1 haven't done that as much of late.

2 "Why not?

3 "A. Ultimately did not have the bandwidth or the automation or  
4 the technology to do this in any scalable way.

5 "Q. If you could automate it, would you do it?

6 "Mr. Floyd: Objection. Calls for speculation.

7 "The witness: Yeah. It's hard to say. I'm not  
8 sure."

9 Did you give that testimony during your deposition,  
10 sir?

11 A. I did.

12 Q. And was it truthful?

13 A. Yes.

14 Q. And in that testimony, sir -- and I'm specifically  
15 referring to the testimony that you gave in page 215 of your  
16 deposition, you say that the market is ultimately a more  
17 effective way to track prices rather than through an MFN; is  
18 that correct, sir?

19 A. Correct.

20 Q. Sir, if the market were a more effective way to track  
21 prices than the MFN, there would have been no need for an MFN  
22 in the Apple agency agreements in the first place, correct,  
23 sir?

24 A. I can't say.

25 Q. Isn't it actually the case that after the pricing MFN

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McDonald - cross

1 accomplished its purpose of moving the industry to an agency  
2 model Apple wasn't concerned about actually enforcing its low  
3 price guarantee?

4 A. No. That's not correct.

5 MR. BUTERMAN: I have no further questions at this  
6 time.

7 REDIRECT EXAMINATION

8 BY MS. RUBIN:

9 Q. Good afternoon, Mr. McDonald.

10 A. Good afternoon.

11 Q. Mr. Buterman just directed your attention to page -- I'm  
12 sorry, paragraph 21 of your declaration with respect to the MFN  
13 enforcement.

14 Do you recall that?

15 A. Yes.

16 Q. And in your direct testimony you say that to enforce the  
17 MFN your team "initially evaluated, usually on a weekly basis,  
18 a limited set of titles to compare prices in the iBookstore  
19 with prices for the same title at other eBook retailers,  
20 typically Amazon, by far the largest competitor.

21 Is that still your testimony, sir?

22 A. Yes.

23 Q. You go on to say, "We've learned through those efforts over  
24 time that publisher compliance with the MFN was generally  
25 good."

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McDonald - redirect

1 A. Yes.

2 Q. Can you describe for the Court how you understood that  
3 publisher compliance with the MFN was generally good, as you  
4 say here in paragraph 21?

5 A. Sure. Well we would audit a set of titles, usually about  
6 300 a week. Initially we found maybe a dozen prices were not  
7 competitive. That number of titles reduced over time.

8 Q. When you say initially you found a dozen that were not  
9 competitive, where you found titles where publishers were not  
10 in compliance with the MFN, what did you and your team do?

11 A. We would call or e-mail the publisher and let them know  
12 that they are in violation of the MFN.

13 Q. Mr. McDonald, under the Apple agency agreements as you  
14 understood them, who bore the responsibility for MFN  
15 enforcement?

16 A. Both myself and -- myself.

17 Q. And let me clarify my question. Who was responsible for  
18 lowering the prices where a publisher was out of compliance  
19 with the MFN?

20 MR. BUTERMAN: Objection.

21 THE COURT: Do you understand the question?

22 THE WITNESS: I do.

23 THE COURT: You may answer.

24 THE WITNESS: Well, publishers are ultimately  
25 responsible for lowering their own -- for changing their

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McDonald - redirect

1 prices, lowering it. We also felt like it was our  
2 responsibility to make sure they are doing so.

3 Q. But it was generally your expectation that publishers would  
4 comply with the MFN because under the contracts the  
5 responsibility was theirs to lower prices, correct?

6 A. That's correct.

7 MR. BUTERMAN: Objection.

8 THE COURT: Sustained. Stricken.

9 Q. Mr. McDonald, did you understand that publishers would  
10 generally abide by the MFN by lowering prices where there was a  
11 lower available customer price?

12 MR. BUTERMAN: Objection.

13 THE COURT: Sustained.

14 Q. Mr. McDonald, you say in paragraph 21 of your declaration  
15 that eventually your weekly efforts lessened.

16 Mr. Buterman asked you some questions about this and  
17 you said -- he asked you whether your resources were better  
18 spent building the store and you agreed with him, that they  
19 were.

20 Why were your resources better spent building the  
21 store as opposed to monitoring the MFN?

22 MR. BUTERMAN: Objection.

23 THE COURT: Yes. I think actually if I remember  
24 correctly that was read from the deposition testimony. It  
25 wasn't Mr. Buterman who said it. It was the witness. So if

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McDonald - redirect

1 you want to ask -- rephrase the question.

2 MS. RUBIN: I'd be happy to, your Honor.

3 Q. Mr. McDonald at your deposition and again today you have  
4 confirmed that there came a point in time where Apple's  
5 resources were better spent building the bookstore. Do I  
6 understand your testimony correctly?

7 A. Yes.

8 Q. Why was that?

9 A. Well because publishers were complying and they were  
10 lowering the prices. And the instances of us finding examples  
11 were so, so few that it no longer required weekly monitoring.

12 Q. Mr. McDonald, when we looked at -- Mr. Buterman showed you  
13 some passages from your deposition about the MFN.

14 Did you understand Apple's MFNs to cover all eBooks?

15 A. No.

16 Q. Which eBooks did you understand to be covered by Apple's  
17 MFN in these agency agreements?

18 A. New releases.

19 Q. So would that be one reason when -- I'm sorry. Withdrawn.

20 Would that be one reason why Apple would not enforce  
21 an MFN with respect to a disparity between titles?

22 MR. BUTERMAN: Objection.

23 THE COURT: Sustained. Form.

24 Q. Mr. McDonald, to the extent that you found a price  
25 disparity between titles that were not covered by the MFN, did

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McDonald - redirect

1 you and your team ask a publisher to adjust the prices?

2 MR. BUTERMAN: Objection.

3 THE COURT: Overruled.

4 THE WITNESS: Yes, we did.

5 Q. And why would you do that?

6 A. Because we wanted to be price competitive.

7 Q. So, is it your testimony here today, sir, that even where  
8 the MFN was not in effect, there were occasions where you asked  
9 publishers to lower their prices?

10 A. Yes.

11 Q. And, again, sir could you describe to the Court the  
12 circumstances that would lead to you requesting that a  
13 publisher do that.

14 A. Sure. Sometimes we see that a publisher's sales are not  
15 tracking with other publishers, other peer publishers or the  
16 iBookstore itself. And when that happens one thing we will do  
17 is look at pricing. And, you know, if we see that a set of  
18 their titles is not being priced competitively, we'll let that  
19 publisher know and we'll talk about it and see if, you know --  
20 we'll talk about whether pricing is the reason.

21 Q. And how do publishers typically react to those  
22 conversations?

23 A. You know, I think they've been receptive overall. I think  
24 it's important to show data. And the sorts of data that we  
25 typically show is, you know, you're making more money by



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McDonald - redirect

1 offering this title or these sets of titles with some kind of a  
2 discount than not.

3 Q. Mr. McDonald in your capacity as manager of the U.S.  
4 iBookstore do you have occasions to talk to publishers during  
5 your average work week?

6 A. I do.

7 Q. On average, how many times per week do you talk to  
8 publishers?

9 A. Me personally, anywhere from five to ten conversations.

10 Q. And what about your team, sir?

11 A. I would say dozens. They all have weekly calls with key  
12 accounts. They're on the phone almost the entire -- entire  
13 week.

14 Q. And the types of conversations that you were just  
15 describing to me, are those conversations that you and your  
16 team still have with publishers to this day?

17 A. They are.

18 Q. When was the last time you recall personally having a  
19 conversation with a publisher to bring to their attention  
20 pricing disparities for higher prices on the iBookstore that  
21 you believe inhibited that publisher from being competitive on  
22 your store?

23 MR. BUTERMAN: Objection.

24 THE COURT: Overruled.

25 THE WITNESS: Just last week.

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McDonald - redirect

1 Q. Tell the Court about that conversation, sir.

2 A. Sure. Similar to the example I just gave where their sales  
3 were not doing well and I don't think they were paying very  
4 close attention to their -- the pricing on their titles. And I  
5 thought we gave a very compelling case that showed that by, you  
6 know, offering some kind of discount, by being competitive --  
7 by offering a competitive price on our platform they would  
8 benefit.

9 Q. Why would they benefit from offering a competitive price on  
10 your platform?

11 A. Well they would sell more books.

12 Q. And is it your position generally that where a publisher  
13 lowers its prices they'll sell more books on the iBookstore?

14 A. Generally.

15 Q. Are there exceptions to that, sir?

16 A. Sure. You know, there's a range of -- customers are --  
17 price is one factor in what drives sales. We do typically see  
18 sales volume increase when prices are lowered. But that's not  
19 always the case.

20 Q. Mr. McDonald, I want to move on to a different topic.

21 Earlier today during cross-examination by counsel, counsel  
22 pointed your attention to two exhibits, PX621 and PX904. One  
23 is a press release from Amazon covering Kindle for a Mac. The  
24 other is a press release covering Kindle for a PC. And in  
25 particular Mr. Buterman drew your attention to certain of the

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1 bullet points in each of these press releases.

2 Do you recall that?

3 A. Yes.

4 Q. Mr. McDonald, you say in your direct testimony that you  
5 were a person at Apple responsible for exploration of -- I'm  
6 sorry -- investigation of the eBooks industry as Apple was  
7 exploring entering it; is that correct, sir?

8 A. Yes.

9 Q. And as part of that, did you look at e-reader applications  
10 for the PC?

11 A. Not typically.

12 Q. Why not?

13 A. They weren't gaining much traction. Not a lot of people  
14 were buying books from those places.

15 Q. Is it fair to say that e-reader applications for the PC and  
16 for the Mac were, in your view, a negligible part of the eBooks  
17 industry at that point in time?

18 MR. BUTERMAN: Objection.

19 THE COURT: Sustained.

20 Q. Did you have a view as to what portion of the eBooks  
21 industry applications for PCs or Macs constituted at that point  
22 in time?

23 A. Very small.

24 Q. I want to draw your attention back to paragraph 31 of your  
25 declaration, Mr. McDonald, if we could, where you describe a

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McDonald - redirect

1 number of features and functionality that in your testimony  
2 were introduced or improved through the iBooks app for eBooks  
3 when utilized on an Apple device?

4 A. Yes.

5 MS. RUBIN: Your Honor, for illustrative purposes we'd  
6 like to bring to Mr. McDonald for his use Defendant's Exhibit  
7 530 and Defendant's Exhibit 529. These are the first  
8 generation iPad launched on April 3, 2010 and the new iPad.  
9 These have been provided to the government and the Court in  
10 connection with Apple's pretrial submissions on April 26.

11 MR. BUTERMAN: Objection.

12 MS. RUBIN: Your Honor, we seek to offer these --

13 THE COURT: Overruled.

14 MS. RUBIN: One moment, your Honor.

15 Your Honor, may I stop the clock to have a  
16 conversation with counsel about the time allocation that your  
17 Honor described before the break?

18 Your Honor, we asked counsel if they would stipulate  
19 to an extension of 30 minutes on both sides. I just want to  
20 represent for the record that counsel's representation was a  
21 no.

22 Q. Mr. McDonald, if I could, could I ask you to turn on the  
23 first generation iPad that's Exhibit DX529.

24 A. Yes.

25 Q. You'll see -- could I ask you to go to the iBooks

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McDonald - redirect

1 application. You'll see that this has been preloaded with a  
2 series of books?

3 A. Yes.

4 Q. Do you recognize some of these books, Mr. McDonald?

5 A. I do.

6 Q. Mr. McDonald, in paragraph 31, you describe a host of  
7 features and functionalities that were improved or enhanced  
8 through the introduction of the iPad.

9 Can you describe for me, looking at the books in the  
10 iPad, some of these features?

11 MR. BUTERMAN: Objection to form.

12 THE COURT: Overruled.

13 Q. Well let's start with the page curl function.

14 A. Sure.

15 Q. Mr. Buterman asked you some questions about page curl or  
16 page turning animation functions that were available on the  
17 Penguin for iPhone app as well as available on the Kindle app  
18 that was launched on April 2, 2010.

19 First, do you remember the launch of the iPad in  
20 January of 2010?

21 A. I do.

22 Q. And were you at that event?

23 A. I wasn't at it in person but I watched it.

24 Q. But you've seen a video of that event, correct?

25 A. Yes, I have.

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McDonald - redirect

1 Q. And do you recall Mr. Jobs demonstrating the page curl  
2 feature as part of his demonstration of the iBookstore at that  
3 event?

4 A. I do.

5 Q. Could you take me through the page curl feature that was  
6 available on iBooks on April 3, 2010 and demonstrate for the  
7 Court how it worked and whether or not that was an innovation  
8 over other e-reader apps available at the time?

9 MR. BUTERMAN: Objection.

10 THE COURT: Overruled.

11 THE WITNESS: Sure. Well when we launched the book we  
12 chose, our initial launch, to maintain the book metaphor where  
13 you see pages on the side. And you --

14 THE COURT: This may be a little easier if I  
15 disclose -- I don't think this will be a shock to anyone -- I  
16 have an iPad. I love my iPad. I think, you know so if this --  
17 I have seen this feature, just so you know. How  
18 technologically challenged the court is, is or isn't relevant  
19 here.

20 THE WITNESS: Quite simply then. I think we  
21 endeavored to recreate the book experience.

22 Q. Sure. Why don't we do something then. Mr. McDonald, can I  
23 ask you to put down the iPad 1 and pick up the second  
24 generation iPad for me, if you could.

25 A. Yes.

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McDonald - redirect

1 Q. In your second generation iPad, the iBooks app is loaded  
2 with the book Olivia by Ian Falconer. I'd also like to submit  
3 to the Court and have Mr. McDonald look at a hard copy of  
4 DX510.

5 MR. BUTERMAN: Your Honor.

6 THE COURT: Yes.

7 MR. BUTERMAN: We do have a relevance objection to the  
8 iPad 2. It came out much later and we don't understand the  
9 relevance of showing something on that device.

10 THE COURT: Ms. Rubin.

11 MS. RUBIN: Your Honor, we're using the iPad 2 for  
12 demonstrative purposes. The fixed format layout, about which  
13 I'm about to ask Mr. McDonald was developed in December 2010.

14 It's Apple's position that were it not for the eBook  
15 store, Apple would not have had an incentive to develop this  
16 feature.

17 It could not be loaded with the original iBook  
18 software on the iPad 1. That's why it's being demonstrated on  
19 the iPad 2.

20 MR. BUTERMAN: Your Honor that's exactly why we  
21 believe it's not relevant.

22 THE COURT: Sustained.

23 Q. Mr. McDonald why don't you pick up the hard copy then of  
24 DX510.

25 Mr. McDonald let's take a different course. Why don't

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McDonald - redirect

1 we put DX510 aside, if we could, as charming as Olivia is.

2 Mr. Buterman asked you about a series of innovations  
3 before the break including fonts, night reading, and others.  
4 Can you describe for the Court in your words how those  
5 innovations were improved upon by Apple upon the introduction  
6 of iBooks or future generations of iBooks?

7 A. Sure.

8 Q. Let's start with fonts if we could.

9 A. Sure. So you know we -- well we've had a lot of experience  
10 at Apple with fonts over the years. But making them work for  
11 e-reading devices was a particularly rigorous endeavor. For  
12 months, and months, and months we test each font at discrete  
13 sizes on different devices and different levels of brightness.  
14 We do this while taking into account letting and kerning, that  
15 is the space between characters, the line height, that sort of  
16 thing. And the overall effect, whether you're a layman or not,  
17 I think is an aesthetically pleasing result and a more readable  
18 one.

19 Q. Let's talk about fixed layout if we could for a second?

20 A. Sure.

21 Q. You understand what I mean by fixed layout or fixed format?

22 A. I do.

23 Q. Can you describe to the Court how fixed format was an  
24 innovation that Apple made to the market in December 2010?

25 MR. BUTERMAN: Objection.



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McDonald - redirect

1 THE COURT: December of 2010.

2 MS. RUBIN: Yes. That's when it was introduced, your  
3 Honor.

4 THE COURT: Mr. Buterman.

5 MR. BUTERMAN: Your Honor, the same objection to the  
6 iPad. That's several months after the iPad was introduced and  
7 when the iBookstore went live.

8 MS. RUBIN: Your Honor, may I be heard?

9 It's Apple's position that were it not for the  
10 introduction of the iBookstore Apple would not have invested  
11 the considerable time and resources to make fixed format  
12 available.

13 Mr. McDonald's testimony also is that fixed format was  
14 something under development I believe at the time that the  
15 iBookstore was introduced.

16 THE COURT: Overruled.

17 THE WITNESS: Fixed layout or fixed format was our  
18 solution to support highly illustrated or complex layouts,  
19 books that were full spread.

20 MS. RUBIN: Why don't we put Olivia back up on the  
21 screen so Mr. McDonald can explain how fixed layout works.

22 Q. Go ahead, Mr. McDonald.

23 A. Actually let's talk about this page prior to the fixed  
24 layout being launched. Well, first, it wasn't possible.  
25 Because what happens when you change the font size or the

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McDonald - redirect

1 orientation is that images -- well the -- what may have  
2 happened in this particular screen shot we're looking at is  
3 that the text alone may have shown up all by itself on a single  
4 page. Then you may have seen just the art on the next page.  
5 Then you may have seen Olivia's mom on the third page. And  
6 that's obviously not how the author/illustrator, Ian Falconer,  
7 intended it.

8 Q. Mr. McDonald, may I just interrupt you for a second. At  
9 the time that fixed layout was introduced by Apple, could  
10 Olivia be seen like this in any other e-reader app that you're  
11 familiar with?

12 A. No. This book did not exist. Because the  
13 author/illustrator/publisher/editor rightly did not think that  
14 there was a content or a platform that supported it and  
15 retained the integrity of the product.

16 Q. And in your experience as the manager of the U.S.  
17 iBookstore was that also true for other children's books and  
18 similar books with text married to graphics like travel guides,  
19 cookbooks, and other similar books?

20 A. Absolutely.

21 MS. RUBIN: No further questions, your Honor.

22 RECROSS EXAMINATION

23 BY MR. BUTERMAN:

24 Q. Mr. McDonald, are children's books considered trade books?

25 A. Yes.

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McDonald - recross

1 Q. They are. Are you sure about that?

2 A. I am.

3 Q. And what about travel books?

4 A. Yes.

5 Q. Cookbooks?

6 A. Cookbooks. Yes.

7 MR. BUTERMAN: Thank you.

8 THE COURT: Any additional questions?

9 MS. RUBIN: No, your Honor.

10 THE COURT: You may step down. Thank you,  
11 Mr. McDonald.

12 THE WITNESS: Thank you.

13 (Witness excused)

14 THE COURT: Next witness.

15 MS. RICHMAN: Your Honor, Cynthia Richman for Apple.  
16 Apple calls Dr. Kevin Murphy.

17 THE COURT: Dr. Murphy, if you could come up here.  
18 I'm going to ask counsel if they could help clear the witness  
19 stand for poor Dr. Murphy who has, I'm sure, going to have his  
20 own set of exhibits.

21 KEVIN M. MURPHY,

22 called as a witness by the Defendant,

23 having been duly sworn, testified as follows:

24 THE COURT: Dr. Murphy, you have been handed a  
25 declaration which is marked as DX724. And I believe your

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McDonald - recross

1 signature is on the 23rd page.

2 Do you see that?

3 THE WITNESS: Yes, I do.

4 THE COURT: Did you sign that on May 29?

5 THE WITNESS: I believe so, yes.

6 THE COURT: Before signing that document, did you read  
7 it carefully?

8 THE WITNESS: Yes. I think there's been some changes  
9 because it looks like there's some redacted portions relative  
10 to when I signed it, but yes.

11 THE COURT: And do you swear to the truth of its  
12 contents?

13 THE WITNESS: Yes, I do.

14 THE COURT: Any objections to receipt of DX724?

15 MR. RYAN: Yes, your Honor. And an inquiry as well,  
16 your Honor. So there have been extended discussions about  
17 Dr. Murphy's revised declaration and I believe there was a  
18 Court ruling on certain aspects of it. And I'm referring in  
19 particular, your Honor, to those portions of his declaration  
20 that refer to acts that are consistent with individual  
21 interests or not consistent with conspiracy. I just want to  
22 preserve for the record those objections because -- and not  
23 walk him or the Court through all of those objections again  
24 because there are several such references in his declaration.  
25 But my understanding it's been fully briefed. It's been ruled

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McDonald - recross

1 on by the Court. So if that's acceptable to the Court, that's  
2 the way we'll proceed.

3 THE COURT: Yes. I'm not sure what I'm accepting,  
4 actually. So I want to be sure before I agree with you.

5 MR. RYAN: I could give you --

6 THE COURT: You're preserving your objections to the  
7 extent I've rejected them?

8 MR. RYAN: That's correct.

9 THE COURT: Fine.

10 MR. RYAN: We have some other objections, your Honor.  
11 Paragraph 24 of his declaration.

12 The sentence that begins "similarly." Just that  
13 sentence, your Honor.

14 THE COURT: You move to strike the whole sentence?

15 MR. RYAN: Yes, your Honor.

16 THE COURT: Well, to the extent -- I mean in this  
17 sentence Dr. Murphy indicates something about Amazon and Barnes  
18 & Noble that he's presuming. And then he has a citation to the  
19 testimony of a witness from Amazon. So, I'm not using this for  
20 fact finding. To the extent that it underlies an opinion he's  
21 giving, it can be tested.

22 MR. RYAN: Paragraph 25, your Honor.

23 THE COURT: Your objection is.

24 MR. RYAN: The sentence that begins, "In addition as  
25 explained by Professor Klein." So this is just repeating

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McDonald - recross

1 Professor Klein's opinion in his report, "his" being Professor  
2 Murphy.

3 THE COURT: Overruled.

4 MR. RYAN: And paragraph 53, your Honor. The  
5 objection here is "Economics predicts how Amazon would react to  
6 the introduction of the iPad in bookstore." And there is no  
7 factual basis in the record for this. This is just  
8 Dr. Murphy's speculation.

9 THE COURT: Overruled.

10 MR. RYAN: Thank you. That's it, your Honor.

11 THE COURT: With these rulings, DX724 is received.

12 (Defendant's Exhibit 724 received in evidence)

13 CROSS-EXAMINATION

14 BY MR. RYAN:

15 Q. Dr. Murphy, good afternoon.

16 A. Good afternoon.

17 Q. Could you turn to paragraph 19 of your declaration, please.

18 Are you there?

19 A. Yes.

20 Q. And in this paragraph in the second sentence you identify  
21 increased physical book sales as a benefit to publishers  
22 resulting from higher retail prices, correct?

23 A. Yes. That would be one potential benefit to publishers.

24 Q. And am I correct, sir, that nowhere in your declaration do  
25 you quantify that benefit to publishers?

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Murphy - cross

1 A. No. I did not. That was other people analyzed the output  
2 data.

3 Q. But there is no where in your declaration, is there,  
4 quantitative analysis of the increased physical book sales as a  
5 benefit to the publishers, correct?

6 A. No, there is not.

7 Q. And you also say that higher retail prices for eBooks  
8 reduced the substitution of eBooks for physical books, correct?

9 A. Yes.

10 Q. And I take it nowhere in your declaration do you quantify  
11 the degree of that substitution in any way, correct?

12 A. No. I was speaking as a matter of economics.

13 Q. Right. But you did not undertake to quantify in this case  
14 the extent to which that substitution occurred, correct?

15 A. No, I did not.

16 Q. And then you go on to say that higher retail prices for  
17 eBooks protected the brick and mortar bookstore infrastructure,  
18 correct?

19 A. Yes.

20 Q. And did you -- you don't say in your declaration the degree  
21 to which that occurred, correct, how much protection there was?

22 A. I did not, no.

23 Q. And you didn't inquire into that either, did you?

24 A. No. As I said, I wasn't the person who analyzed the data  
25 in this case.

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Murphy - cross

1 Q. So, here you're talking simply about economic theory,  
2 correct?

3 A. I think it's more than theory. I think it's the things  
4 we've applied in economics generally. We have a host of  
5 empirical evidence that consumers and other individuals do  
6 respond.

7 So it's not just theory. It's based on a broad base  
8 of empirical evidence.

9 Q. But in this case you did not analyze any empirical evidence  
10 for purposes of your opinion, did you, sir?

11 A. Not specific. But I'm just saying it's not specifically  
12 theory. You mentioned it was based on theory. And the idea  
13 that consumers substitute and respond to prices is not a  
14 theoretical proposition. It's been long established in  
15 economics.

16 Q. And we'll talk about that in a second. But I just want to  
17 establish nowhere in your declaration, sir, is there any  
18 empirical analysis that you did in connection with this case,  
19 correct?

20 A. I did not. As I said, that was not -- I was not asked to  
21 do that. That was not my responsibility in this case.

22 Q. And it's also the case that in your declaration you do not  
23 cite or refer to economic works, publications, treatises,  
24 articles of the sort, correct?

25 A. Not generally. I think I refer to the economics, sort of



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Murphy - cross

1 body of knowledge that we have as economists.

2 Q. Right. But you don't make any specific reference to say a  
3 particular treatise, a particular writing, a particular paper,  
4 anywhere in your report, do you?

5 A. Nor do I generally in my academic work.

6 Q. But just not with respect to generally, sir. But this  
7 report in this case, do you do that?

8 A. No. It would not be standard practice for me to do that,  
9 particularly for things like people respond to prices.

10 Q. So, no empirical work and no reference to outside economic  
11 sources anywhere in your declaration, correct?

12 A. I wouldn't say that's true. I'd have to go back -- maybe  
13 in my declaration. I think my reports would have had some  
14 references to those things.

15 Q. Are you sure about that?

16 A. I don't know. I'd have to go back and look. It's all  
17 based on knowledge. You and I went through it at my  
18 deposition.

19 Q. Staying with paragraph 19, you say, "For publishers, higher  
20 retail prices increased eBook sales and profits."

21 Do you see that?

22 A. Where are you looking at?

23 Q. Paragraph 19, page 6 of your declaration. The second  
24 sentence.

25 A. Yes.

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Murphy - cross

1 Q. And you say -- did you see what I just read, "For  
2 publishers, higher retail prices increased eBook sales and  
3 profits"?

4 A. Oh. That would be a -- I don't think we would say it  
5 increased eBook sales. I think we should say profits.

6 Q. Let me just stay with you. So you were just talking about  
7 I think a body of economic learning that says prices go up,  
8 sales go down, right?

9 A. Yes.

10 Q. And here you're suggesting prices go up and sales go up,  
11 correct?

12 A. No. That would have been -- that's a mistake that I wrote.

13 Q. Okay.

14 A. That was -- I wasn't trying to say eBook sales went up. I  
15 meant profits.

16 Q. Right. And, in fact, sir, you'd agree with me, all things  
17 being equal, if eBook prices went up, output would go down,  
18 correct?

19 A. If you don't take account of other changes, yes. If we're  
20 just being looking at changes in prices, that's what economics  
21 tells us.

22 Q. Because eBooks are what you call a normal good, correct?

23 A. Actually it's true even for most goods that aren't normal.  
24 Normal is a sufficient condition, not necessary to have to have  
25 it.

D6j9usa3

Murphy - cross

1 Q. So we can agree. EBook prices go up. Hold everything  
2 equal. EBook output goes down?

3 A. That would be generally the case. Like you said, all else  
4 equal is an important qualifier there.

5 Q. Could you turn to paragraph 44 of your declaration, please.  
6 That's on page 16, sir.

7 A. Okay.

8 Q. And the first sentence of this paragraph reads, "A firm  
9 will enter a competitive market only if it can develop a  
10 business plan it expects to be profitable," correct?

11 A. That's correct.

12 Q. And then you go on to talk about Apple's entry into the  
13 marketplace, correct?

14 A. I believe that's correct, yes.

15 Q. And you -- do I read your declaration correctly, sir, that  
16 you believed at the time Apple entered the eBook market it was  
17 a competitive market?

18 A. There was competition in some ways.

19 Q. I'm sorry. Go ahead.

20 A. No. I'm saying that the beginning sentence is true. I  
21 think you have to be profitable regardless of whether it's  
22 competitive or not.

23 Q. Right. But you were making the point here, you went on to  
24 describe the market Apple was coming into. And you were  
25 conveying the message that the eBook market was a competitive

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Murphy - cross

1 market, right?

2 A. That wasn't the intent of the sentence. The intent of the  
3 sentence was that Apple would have to compete with the other  
4 sellers in the market. That's what I was referring to.

5 Q. Then you go on to say that "Apple had learned from public  
6 sources and its discussions with publishers about Amazon's  
7 practice of selling many eBook titles below wholesale cost."

8 Do you see that?

9 A. Yes.

10 Q. So, Apple enters a market where a major seller is pricing  
11 below cost, correct?

12 A. That was the situation at the time at which they entered.

13 Q. And that's one of the reasons, that is to say there was low  
14 pricing in the market, that you believed the market was a  
15 competitive market, right?

16 A. I don't know if that was the particular thing. I mean we  
17 usually don't see pricing below cost in a competitive market.

18 It's not inconsistent. That wouldn't be one of the  
19 reasons I would qualify it as competitive, no.

20 Q. And you say Apple had to compete with several other  
21 established book sellers, correct?

22 A. Yes.

23 Q. One was Barnes & Noble, correct?

24 A. Yes.

25 Q. And one was Amazon?

D6j9usa3

Murphy - cross

1 A. Yeah. I would say Amazon was the more established of the  
2 two.

3 Q. And Sony was in the market?

4 A. Yes. Sony was in the market. Wasn't doing as well.

5 Q. And Kobo was in the market, correct?

6 A. Yeah. I would say Amazon was the 800-pound gorilla in that  
7 case.

8 Q. And Barnes & Noble had recently entered the eBook market,  
9 correct?

10 A. Well, yeah.

11 I mean they kind of done it in pieces. They had come  
12 in in the eBook market without a reader earlier the year before  
13 and then they had just come out with their reader. So they  
14 were kind of still on their way in, in some sense.

15 THE COURT: Excuse me, counsel. I'm afraid we're  
16 going to have to break at this point.

17 So I'll see everyone at 2:00. The government has 34  
18 minutes left. And Apple has 22.

19 Thank you all.

20 (Luncheon recess)

D6JPUSA4

Murphy - cross

## A F T E R N O O N S E S S I O N

2:04 P.M.

CROSS-EXAMINATION (Resumed)

BY MR. RYAN:

Q. Good afternoon, Dr. Murphy.

A. Good afternoon, Mr. Ryan.

Q. Do you have your declaration up there?

A. Yes, I do.

Q. Could you turn to paragraph 20, please?

A. Sure. Okay.

Q. And do you see the paragraph begins, "Plaintiffs' experts provide no economic evidence that Apple wanted higher prices."

Do you see that?

A. That's correct.

Q. And I would like to ask you a question about Apple's view on prices, two different periods of time. When Apple was looking at the market, before it executed its agency agreement, so back in December of 2009, did Apple have a view on whether prices should be higher in the marketplace?

A. I can't speak directly to Apple's view. I think I can speak to the economics because I'm an economist. I can't get into their mind, and I think they're the best people to testify about what their actual view was. I can tell you what was a rational economic act in Apple's place was.

Q. But they --

D6JPUSA4

Murphy - cross

1 A. They would be focused on whether the books would be  
2 profitable for them. That's what they would be focused on, and  
3 whether the prices were higher, lower or the same, they would  
4 care about what their profits would be on those books.

5 MR. RYAN: Move to strike, your Honor.

6 THE COURT: Overruled.

7 Q. So did you -- You didn't undertake any investigation to see  
8 if pre-agency Apple thought market prices were too low; is that  
9 a fair statement?

10 A. I didn't think to myself that that was my job. My job was  
11 to provide an economic analysis, and the conclusion of that was  
12 just what I said.

13 Q. Now, you agree prices went up once agency took effect,  
14 right?

15 A. I think there was a mix of prices. Prices for some books  
16 went up, others went down; so I don't really say across the  
17 board they went up, no.

18 Q. New York Times best seller prices went up, right?

19 A. I don't know if that was true for everyone. I think on  
20 average that would be true for the defendant publishers.

21 Q. Was that consistent with what Apple wanted, in your view?

22 A. I don't think that was Apple's desire, per se. I think  
23 Apple's desire in this case would have been -- this is speaking  
24 as an economist, not getting in Apple's mind -- what they would  
25 care about is can books be profitable for them to sell. And

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Murphy - cross

1 that would be their logical, rational focus as an eBook seller,  
2 and that would be consistent as far as whether books go up or  
3 down.

4 Q. So if you could turn to paragraph 15 on Page 5 of your  
5 declaration, and there you say, the second sentence, "Even if  
6 all six publishers had long-term contracts that bound them to  
7 offer Amazon wholesale terms, Apple still would have benefited  
8 from an agency contract with all the challenged terms." Do you  
9 see that?

10 A. That's correct.

11 Q. Now, with respect to the publishers, did you undertake to  
12 determine whether if a publisher had a long-term contract with  
13 Amazon, wholesale terms, it still would have been in the  
14 publisher's interest to enter into an Apple agency agreement?

15 A. I did not -- I did not undertake to valuate the publishers.  
16 I can't say here one way or the other. My focus was on Apple's  
17 conduct and whether that conduct would be in their best  
18 interest, absent participation in conspiracy and absent any  
19 anticompetitive effect.

20 Q. Now, one more question on publishers.

21 A. Sure.

22 Q. With respect to any one or more publishers, did you  
23 undertake to determine whether any publisher acted contrary to  
24 its unilateral self-interest in entering into an Apple agency  
25 agreement?



D6JPUSA4

Murphy - cross

1 A. I did not. I did not undertake that specifically. I can't  
2 say one way --

3 THE COURT: Thank you.

4 A. -- or the other.

5 MR. RYAN: Thank you.

6 REDIRECT EXAMINATION

7 BY MS. RICHMAN:

8 Q. Good afternoon, Professor Murphy.

9 A. Good afternoon, Miss Richman.

10 Q. Do you remember when Mr. Ryan asked you about the basis for  
11 your economic conclusions?

12 A. Yes, I do.

13 Q. And he asked you whether you performed any empirical  
14 analysis in connection with rendering your economic opinions in  
15 this case?

16 A. Yes, I do.

17 Q. Can an economist render an economic opinion without  
18 performing any number crunching?

19 A. Yeah, I think -- and I think it's good you that asked that  
20 because, you know, the --

21 THE COURT: I think your answer is yes, then.

22 Q. Can you please explain?

23 A. Yeah, I was just -- I was just going to say because  
24 economics, as an empirical science, doesn't just depend on  
25 numbers crunching. A lot of it is analyzing the situation you

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Murphy - redirect

1 see, and fitting it into a standard economic framework.

2 Q. And Mr. Ryan also asked you whether you had cited any  
3 treatises or economic literature in your opinion; do you recall  
4 that?

5 A. Yes, I do.

6 Q. And can you explain -- I think you started to explain your  
7 general policy for citing economic literature. Can you expand  
8 on that?

9 A. Yes. The theory of the firm, which is what we're applying  
10 here, what we would expect a profit-maximizing, economic entity  
11 to do is generally accepted in economics. It's not something  
12 for which one would generally cite a treatise. The type of  
13 theory we apply here is probably one of the most broadly  
14 accepted theories in economics, one of the most widely  
15 accepted, and regularly taught, something I teach on an annual  
16 basis to students on a variety of levels; so it wouldn't be --

17 Q. And can you --

18 A. -- something outside that.

19 Q. And can you please explain for the Court a little bit about  
20 your background in economics?

21 A. Yeah. I'm a professor of economics in graduate school of  
22 business and in department of economics at the University of  
23 Chicago. I teach a Ph.D. course in economics, which is the  
24 type of economics I talk about here today, that all our Ph.D.  
25 students take. I also teach a course in business school on

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Murphy - redirect

1 advanced microeconomics for MBA students who want a more  
2 challenging exposure to that material.

3 I also teach a summer camp for students from Ph.D.  
4 programs around the country who come to Chicago in June, which  
5 is what I'm going to do next week, to teach them some of the  
6 tools that we use in economics.

7 Q. And I don't want to embarrass you, Professor Murphy, but  
8 have you won any awards in the field of economics?

9 A. Yeah. I was awarded the John Bates Clark medal, which at  
10 the time was awarded every other year to an outstanding  
11 American economist under the age of 40. I've won a MacArthur  
12 Fellowship for my work in economics. I've also won several  
13 other awards for my papers. So I've done okay.

14 Q. Now, Professor Murphy, do you still have your declaration  
15 in front of you?

16 A. Yes, I do.

17 Q. Can you please turn to paragraph 34?

18 A. Yes.

19 Q. And in that paragraph, I believe you refer to platform  
20 economics; is that correct?

21 A. Yes, I do.

22 Q. And can you explain whether that is a body of economic  
23 learning that informs your economic opinions in this case?

24 A. Yes.

25 MR. RYAN: Objection.

D6JPUSA4

Murphy - redirect

1 THE COURT: Excuse me one second. Overruled.

2 A. Yes, it is.

3 Q. And can you please explain how it informs your opinions in  
4 this case?

5 A. Well, you know, one of the things that we think about in  
6 economics is a physical platform. Most commonly, platforms are  
7 products and groups of products that provide a functionality  
8 and often requires participation by individuals on what we kind  
9 of call both sides of the market.

10 So an e-reading platform and iBookstore is a specific  
11 part of that. It's important to be able to get a large number  
12 of books or book sellers on one side, and a large number of  
13 customers on the other side to make it successful. Basic idea  
14 being, book buyers want to go to a store that has more  
15 selection of books, and book sellers want to go to a place that  
16 has lots of buyers, and you need to get that started. And one  
17 of the ways you get that started is by having a critical mass  
18 of eBook sellers there to attract the buyers, which will  
19 attract additional sellers.

20 Q. Thank you. Can you -- We'll come back to that in a minute,  
21 but can you turn to paragraph 44 of your declaration, another  
22 one that Mr. Ryan asked you about. The first sentence states,  
23 "A firm will enter a competitive market only if they can  
24 develop a business plan it expects to be profitable." Did I  
25 read that correctly?

D6JPUSA4

Murphy - redirect

1 A. Yes, you did.

2 Q. And can you please explain what you meant in that  
3 testimony?

4 A. Yeah. Well, I mean, it's certainly -- that's kind of even  
5 more broad than that because a firm will enter a business if it  
6 expects it to be profitable, and that doesn't depend whether  
7 the market is competitive or not. So it's certainly true of a  
8 competitive market. It can be true of a market that wasn't  
9 competitive. You're going to go into a business, under  
10 economic theory, if you can make it profitable. If you can't  
11 make it profitable, you don't have the incentive to enter it.  
12 It's like the definition of profit maximization.

13 Q. And did you evaluate, in connection with your work in this  
14 case, whether Apple developed a business plan that it expected  
15 to be profitable in charting out its strategy for entering the  
16 eBook business?

17 A. Yeah, I guess that what I would say is I applied economics  
18 to look at their actions. And as a matter of economics, the  
19 things that I would expect to see somebody doing in the process  
20 of launching a book reading platform, iBookstore in particular,  
21 would be, one, you'd want to find a way to have lots of books;  
22 No. 2, you'd want to be price competitive with the other --  
23 with the other alternatives out there, and you want to be able  
24 to earn a profit, the most basic principle in economics.

25 Those three principles would be what I would look for

D6JPUSA4

Murphy - redirect

1 and try to do terms and methods of negotiation to be consistent  
2 with those.

3 Q. And what specifically did Apple do to achieve those goals?

4 A. I would say the two things that I examined. They probably  
5 did lots of things. There's lots of technological things and  
6 other things they needed to do, but from an economic  
7 standpoint, two of the key ones were, find a set of contract  
8 terms that were consistent with those goals and negotiate a  
9 contract in a way that will allow them to achieve that critical  
10 mass that they needed to launch the business.

11 Q. So did -- And did you study the particular provisions of  
12 the agreements that Apple entered into that allowed them to  
13 achieve that goal?

14 A. Yes, I did.

15 Q. And can you describe what those were?

16 A. Okay. I examined a number of things. For example, the  
17 most favored nation clause, that's been a discussion, a lot of  
18 discussion at this trial. I evaluated that from an economic  
19 standpoint, and asked whether that would be in Apple's interest  
20 independent of participation --

21 MR. BUTERMAN: Objection, your Honor. It's beyond the  
22 scope.

23 THE COURT: Please don't interrupt the --

24 MR. RYAN: Sorry.

25 THE COURT: -- witness' answer.

D6JPUSA4

Murphy - redirect

1           You may complete your answer.

2           If you have a motion to strike at the end, you may  
3       make it.

4       A. I'm sorry, I was in the middle. So let me -- so they would  
5       have -- I was valuing whether they would have an incentive to  
6       do that, absent participation in a conspiracy and in the  
7       absence of any alleged anticompetitive effect.

8           A simple way to think about that is the hypothetical  
9       that I think was brought up in cross-examination, which was if  
10      Amazon had a long-term contract to remain on agency, in a world  
11      which you couldn't possibly. In my deposition I talked about  
12      the law preventing them, it's the same effect. If you can't  
13      move Amazon to agency, the simple economics of it is it would  
14      still would have been in Apple's interest to have the MFN cause  
15      because what it accomplished was allowed them to be  
16      competitive, allowed them to be competitive in a marketplace  
17      whether Amazon remained on wholesale or Amazon moved to agency.  
18      So that certainly was in their interest either way.

19           MR. RYAN: Move to strike, your Honor.

20           THE COURT: Granted.

21       Q. Professor Murphy, Mr. Ryan asked you about paragraph 19 of  
22       your declaration. Can you turn to that, please? The second  
23       sentence, starting, "For publishers, higher retail prices  
24       increased eBook sales and profits, reduced the substitution of  
25       eBooks for physical books, increased physical book sales and

D6JPUSA4

Murphy - redirect

1 thereby protected the brick-and-mortar bookstore  
2 infrastructure." Did I read that correctly?

3 A. Yes.

4 Q. And did you have a correction to that sentence?

5 A. Yeah. Mr. Ryan did point out the typo there, where I  
6 had -- you know, we had said here that increased eBook sales.  
7 That would not have been part of it. It would have presumably  
8 increased the profits on eBooks. That's a typo, I'm sorry  
9 about that.

10 Q. Okay. And can you explain what you meant in that sentence?

11 A. Yeah, the key part of it was really the latter part because  
12 there were benefits that would have accrued to the publishers  
13 that wouldn't have accrued to Apple. That is, the publishers  
14 would have benefited from higher eBook prices in ways that  
15 Apple didn't, which made it natural that there would be a  
16 disagreement between the parties, with Apple wanting lower  
17 prices and the publishers wanting higher prices.

18 Q. And is that what you're saying in the next sentence, if you  
19 continue on?

20 A. Absolutely.

21 Q. Okay. And that says, "Apple, on the other hand, obtained  
22 no benefit from the higher physical book sales (and lower eBook  
23 sales) resulting from higher eBook prices"?

24 A. Yeah. Actually, I got it right that second time.

25 Q. Okay. And can you just explain what you men there?



D6JPUSA4

Murphy - redirect

1 A. Yeah, I mean, to the extent that the publishers benefited  
2 in other ways from the higher prices, they wouldn't have  
3 accrued to Apple, while Apple would have suffered the lower  
4 sales associated with higher eBook prices. So Apple, you know,  
5 sort of suffered the consequences without the compensating  
6 benefits.

7 Q. Thank you. Going on to the next paragraph that Mr. Ryan  
8 asked you about, paragraph 20, "Plaintiffs' experts." It  
9 starts off stating, "Plaintiffs' experts provide no economic  
10 evidence that Apple wanted higher prices." Did you do any kind  
11 of economic analysis of whether Apple wanted higher prices?

12 A. Yes. Two things. One, they wanted -- the evidence that  
13 they did want lower prices is provided by the fact they  
14 negotiated for price caps to actually restrain the publishers'  
15 ability to charge higher prices. That's what economics would  
16 predict and that's what we see.

17 And under the agency model, particularly, Apple has a  
18 strong incentive to push for lower prices because the  
19 publishers are absorbing 70 percent of any reduction in price,  
20 which is much more favorable from Apple's point of view for  
21 reducing prices than it would have ever been under the  
22 wholesale model.

23 Q. Did you evaluate whether it would have been in Apple's  
24 independent business interest to sell eBooks on the iBookstore  
25 at a price point of 9.99?

D6JPUSA4

Murphy - redirect

1 A. My assessment would be, yes, it would. They would still be  
2 able to earn a 30 percent margin. They would capture the  
3 additional sales provided by the reduction in price while only  
4 bearing 30 percent of that price reduction. That would be very  
5 attractive from their point of view. So you can't make a  
6 presumption that they would like higher prices.

7 Q. And tying that to paragraph 15 of your declaration, that  
8 Mr. Ryan asked you about, I believe there's a hypothetical in  
9 that paragraph.

10 A. Yes.

11 Q. And can you read that into the record, please?

12 A. Yes, it says, "Even if all six publishers had long-term  
13 contracts that bound them to offer Amazon wholesale terms,  
14 Apple still would have benefited from an agency contract with  
15 all the challenged terms."

16 Q. And how does that conclusion relate, if at all, to your  
17 opinion that there's no economic evidence that Apple wanted  
18 higher prices?

19 A. Well, I think it gets back to -- and, again, it probably  
20 centers on the MFN, which is one of the things that was  
21 generated by the MFN, was that Apple would be able to sell  
22 books profitably whether the price points were higher or lower  
23 than they had been previously because they would be able to  
24 earn 30 percent on sales. And while they would earn less per  
25 book, they would sell more books if prices were lower.

D6JPUSA4

Murphy - redirect

1 MR. RYAN: Your Honor, I move to strike on the MFN  
2 part of the answer.

3 THE COURT: It's stricken with respect to the MFN.

4 Q. So focusing on the price points, did you evaluate what  
5 steps Apple took to -- to ensure that prices on the iBookstore  
6 would be set at -- withdrawn.

7 Did you evaluate, in connection with this analysis,  
8 the price caps in the agency agreements?

9 A. Yes, I did.

10 Q. And what did you conclude about whether those price caps  
11 were in Apple's independent business interests?

12 A. I think they were definitely in their independent  
13 interests. They flowed out of that divergence of incentives  
14 between the publishers and Apple that I spoke of earlier, where  
15 the publishers would have wanted higher prices and Apple would  
16 have preferred lower prices. And so I think what you learn  
17 from that is you learn something about Apple's actions and how  
18 they're supported by the underlying economics.

19 MS. RICHMAN: Just a second, your Honor.

20 THE COURT: That's okay. I just want to give Apple  
21 notice that it has five minutes left, roughly, in terms of its  
22 entire time.

23 Q. Professor Murphy, turning again to paragraph 15 and your  
24 hypothetical, was it in Apple's independent business interest  
25 to set the prices on the iBookstore at 9.99 in the

D6JPUSA4

Murphy - redirect

1 hypothetical -- in the context of the hypothetical you outline  
2 in paragraph 15?

3 MR. RYAN: Objection, your Honor.

4 A. I would have believed it would have been in Apple's  
5 interest. I'm not sure --

6 THE COURT: Excuse me, one minute, Doctor. There was  
7 an objection that I didn't rule on fast enough. Overruled.

8 So let me read that question to you again, which I  
9 interrupted. Professor Murphy, turning again to paragraph 15  
10 and your hypothetical, was it in Apple's independent business  
11 interest to set the prices on the iBookstore at 9.99 in the  
12 hypothetical -- in the context of the hypothetical you outline  
13 in paragraph 15?

14 A. Yes, I believe it was because they would have still been  
15 earning 30 percent under the agency terms, and that would have  
16 allowed them to sell substantial number of books on that basis.  
17 So their goals of having a large number of books and those  
18 sales being profitable, which were the primary goals I would  
19 have expected as an economist that they would have, would be  
20 met.

21 MS. RICHMAN: Thank you, Professor Murphy. No further  
22 questions, your Honor.

23 RECROSS EXAMINATION

24 BY MR. RYAN:

25 Q. Just a couple of questions, Professor Murphy. Paragraph 44

D6JPUSA4

Murphy - recross

1 in your report that you were asked about, in the first sentence  
2 it says, "A firm will enter a competitive market only if it can  
3 develop a business plan it expects to be profitable." Would  
4 that principle apply to, as you say later in your -- that  
5 paragraph, to Barnes and Noble when it introduced its NOOK  
6 e-reader? That is to say, it would not have done that unless  
7 it thought it could be profitable, correct?

8 A. I think that's what economics says, yes.

9 MR. RYAN: Thank you.

10 THE COURT: Any further examination?

11 MR. SNYDER: May we have one minute? I think we have  
12 four left. Mr. Heiss counts two more.

13 THE COURT: Uh, oh.

14 MR. SNYDER: And we know Mr. Heiss is very precise.

15 THE COURT: I try to be too.

16 MR. SNYDER: Yes, your Honor.

17 REDIRECT EXAMINATION

18 BY MS. RICHMAN:

19 Q. Just one more question, Professor Murphy, or maybe two.  
20 Professor Murphy, are you aware that Barnes and Noble  
21 entered -- or entered into agency agreements?

22 A. Yes, I am.

23 Q. And do you have an opinion on whether they entered -- they  
24 entered into agency agreements -- or excuse me. Withdrawn.

25 Do you have -- Let me just gather my thoughts, sorry.

D6JPUSA4

Murphy - redirect

1 And did you study whether Barnes and Noble evaluated whether to  
2 enter into an agency agreement because it expected that that  
3 would allow it to be profitable?

4 A. I can't speak -- I can't get in their head, but I can tell  
5 you, as an economist, that is what I would have expected. And  
6 they faced many of the same incentives, from an economic  
7 standpoint, as Apple. So I wouldn't be surprised that that's  
8 the decision that they made. It's very consistent with  
9 economics.

10 Q. Why is that consistent with economics?

11 A. For the same reasons. They, again, wanted to have a wide  
12 selection of books, have those sales of those books be  
13 profitable and be price competitive, and those objectives would  
14 be met by the kind of agreement that the publishers and Apple  
15 signed.

16 MS. RICHMAN: Thank you.

17 THE COURT: Thank you very much, Dr. Murphy, for your  
18 testimony today. Much appreciated. You may step down.

19 (Witness excused)

20 THE COURT: Apple may call its next witness.

21 MR. SNYDER: Your Honor, at this time, Apple rests its  
22 case.

23 THE COURT: Just before you rest, do you have all your  
24 exhibits in? Just to double-check.

25 MR. SNYDER: The answer is, I have no idea, but

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Murphy - redirect

1 Mr. Floyd does.

2 MR. FLOYD: We provided your Honor with the  
3 stipulation with the additional exhibits; so I believe -- what  
4 the one other issue, I guess, was possibly, not specifically,  
5 dealt with is that Mr. McDonald's declaration has a number of  
6 pictures attached to it as exhibits, as illustrations. They  
7 are exhibits. We're not seeking to have them admitted as  
8 evidence. They were objected to, but we wanted them to be able  
9 to at least be considered by your Honor as illustrations of  
10 some of the statements within the declaration.

11 THE COURT: Hmm, not in evidence but considered by me.

12 MR. FLOYD: Well, as demonstratives. As if he were  
13 testifying on the stand, we might put up an illustration so you  
14 could look at, as you would read it, you could see what he was  
15 talking about without -- without necessarily the need for it to  
16 be in evidence.

17 THE COURT: Okay. So I have the declaration DX723.  
18 It doesn't have attachments.

19 MR. FLOYD: When we submitted it, I believe we  
20 submitted it in a notebook.

21 THE COURT: Oh, originally?

22 MR. FLOYD: Originally.

23 THE COURT: Not with the pretrial order?

24 MR. FLOYD: With the pretrial order. So it would be  
25 possible then to make sure that your Honor has that. We can

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Murphy - redirect

1 otherwise make it available.

2 THE COURT: Oh, I have it.

3 MR. FLOYD: Or we'd be happy to have them in evidence  
4 for the limited purpose. The purpose we had is simply as  
5 Mr. McDonald described certain things, there's references in  
6 the declaration, and those are screen shots that were created  
7 or pulled off of the Apple servers to provide illustrations to  
8 the points he was making.

9 THE COURT: Just so the record is clear, these begin  
10 at DX526, but then they have other numbers that aren't in  
11 sequence, 518, 522 -- I'm sorry, well, 526, 518, 519, 500, 521,  
12 522, 511, 510, 489, 495, 496, 494, 493, 486, 503, 504, 517,  
13 516, 515, 505 through 509, and 497 and 498, all of them as DX  
14 numbers. I have no idea if these are duplicative numbers or  
15 not.

16 What is the government's position?

17 MR. BUTERMAN: Your Honor, the government opposes the  
18 introduction of these documents. We lodged authenticity  
19 objections to all of the screen shots, and the position that we  
20 relayed to Apple was quite clear, which is, we needed to  
21 understand where these shots come from -- came from because we  
22 just received them in paper form. We never received that  
23 information.

24 Last evening, with respect to two screen shots that  
25 Miss Rubin had planned to use with the witness, Miss Rubin was



D6JPUSA4

Murphy - redirect

1 kind enough to actually provide us with the information, which  
2 alleviated any concerns that we have.

3 We have no idea where those screen shots come from,  
4 what they reflect, whether we can replicate them on our own,  
5 and therefore, we do not believe that they should come into  
6 evidence.

7 MR. FLOYD: Your Honor, I believe all the screen shots  
8 were obtained in the same manner, the same witness, and  
9 attached to his declaration. So we have them for the limited  
10 purpose to illustrate what they were saying. We have a couple  
11 that are in evidence, which may be sufficient for your Honor to  
12 understand the scope. So we'll leave it to your discretion at  
13 this point, of course.

14 THE COURT: Thank you very much. So with that record,  
15 I'm not going to receive these in evidence. If I choose to  
16 look at them, I'll give notice to the parties that I've relied  
17 on them in rendering my opinion; so you will know what your  
18 position is with respect to my use of them, and whether you are  
19 unhappy or happy with that decision.

20 Okay. So giving everyone one last chance before I  
21 close the record. Good. Everyone, no one is seeking to add  
22 one additional exhibit or document or -- Right, okay, fine.  
23 The record is closed.

24 So I just have a few comments. One, it's been a  
25 privilege to preside over this trial. I worked hard to be

D6JPUSA4

Murphy - redirect

1 prepared for this trial and thought I'd learned a lot by  
2 reading so many documents and affidavits. Whatever, I thought  
3 I'd read a lot and worked hard to be prepared. You have helped  
4 me understand so much more through the presentation of evidence  
5 in these last three weeks, and I'm deeply grateful.

6 And your parties could not be more proud of the  
7 representation, should not consider themselves in any way other  
8 than very proud of the work that's been done in this courtroom,  
9 both on behalf of the governments, who are represented here,  
10 and on behalf of Apple.

11 I also want to say my staff and I deeply appreciated  
12 the courtesies that you've shown us. When I was ruling -- Oh,  
13 we never did McCall. You see?

14 MR. FLOYD: I thought we had --

15 THE COURT: It's gone?

16 MR. RYAN: We did. Yes, it's gone.

17 THE COURT: Because I was about to say --

18 MR. FLOYD: We were not offering any depositions, your  
19 Honor.

20 THE COURT: I was going to say one of the examples I  
21 have of how thoughtful you were about your presentation of  
22 evidence to me was how you presented the objections to  
23 depositions. You so clearly marked who had offered what and  
24 what you were objecting to. It was very easy for me to go  
25 through and give you my rulings, and that's a trivial example,

D6JPUSA4

Murphy - redirect

1 really, of the many, many ways in which you made an effort to  
2 think about how could we help the judge learn what we want her  
3 to understand, and I really want to thank you.

4 I want to thank you also for your cooperation with  
5 each other. You've had your disputes, but you've tried to, I  
6 think, work cooperatively when you could and present me with  
7 those things which you felt were important for me to resolve,  
8 and I deeply appreciate that.

9 Another thing is all the lawyers who you gave an  
10 opportunity to present evidence in this courtroom. It would  
11 have been easy for lead counsel to just take all the witnesses  
12 because the issues are so important to the parties. And, yet,  
13 no doubt with some conversations with your clients, made sure  
14 that lots of lawyers had opportunities to work with witnesses  
15 and present evidence in the courtroom, and I was very impressed  
16 with that. And everyone did an excellent, excellent job.

17 So we're left with minutes on the clock. I know Apple  
18 had only wanted 27 hours, but it was bumping right up against  
19 29, and the government had asked for 30, and only got 29, and  
20 it left some minutes on the table. So I guess we did it just  
21 about right.

22 So tomorrow we start at 9:30. I look forward to  
23 summations. I think -- my expectation, maybe I'm wrong, but,  
24 to me, the issues have somewhat shifted during the course of  
25 the trial, and that's as it should be, I guess, even though,

D6JPUSA4

Murphy - redirect

1 you know, you had a year or so of discovery and a chance to  
2 think hard about the issues and full opportunity to look at  
3 each other's evidence and think about each other's arguments.

4 As you see it play out in the courtroom, things change  
5 a little bit and people have to stay nimble. So I'm very much  
6 looking forward to understanding precisely where we are now,  
7 you know, when I listen to you tomorrow, what things are in  
8 dispute and what things aren't in dispute. I think things have  
9 shifted, at least it's my perception it has.

10 Thank you so much. See you at 9:30.

11 (Adjourned to June 20, 2013, at 9:30 a.m.)  
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473 . . . . .	.2298
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## PLAINTIFF EXHIBITS

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